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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 30

KROGER GROCERY & BAKING COMPANY,
APPELLANT,

vs.

JOHN B. LEWIS, SELDEN R. GLENN, AND HENRY M. CLINE, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

FILED MARCH 25, 1932

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IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

In Equity. No. 3908

THE KROGER GROCERY & BAKING COMPANY, a Corporation Duly Organized and Existing Under the Laws of the State of Ohio, Plaintiff,

vs.

JOHN B. LEWIS, SELDEN GLENN, and HENRY M. CLINE, as Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

BILL OF COMPLAINT—Filed Dec. 27, 1930

To the Honorable Judge of the District Court of the United States for the Eastern District of Kentucky:

The Kroger Grocery & Baking Company, an Ohio corporation, and a citizen and resident of the State of Ohio, suing on behalf of itself and all other persons, firms, corporations and associations similarly situated, brings this, its Bill of Complaint, against the defendants, John B. [fol. 5] Lewis, Selden Glenn and Henry M. Cline as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, and each of them; all of said defendants being citizens and residents of the Commonwealth of Kentucky; said defendants, Henry M. Cline and Clell Coleman residing in the Eastern District thereof, and said defendants John B. Lewis and Selden R. Glenn residing in the Western District thereof.

1. The plaintiff was, at all of the times hereinafter mentioned, ever since has been, and is, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, with its principal office and place of business in the City of Cincinnati, Hamilton County, Ohio, and is a citizen and resident of the State of Ohio. The plain-

tiff has continuously complied with all of the laws of the Commonwealth of Kentucky relating to foreign corporations and is authorized to do and is doing business in said Commonwealth.

2. The defendants, John B. Lewis, Selden Glenn, and Henry M. Cline, are the duly and legally appointed, qualified, and acting members of the State Tax Commission of the Commonwealth of Kentucky, which is a commission created pursuant to an Act of the General Assembly of the Commonwealth of Kentucky, and which commission has been in existence, in pursuance of law, for many years continuously last past. Said individual defendants last named are the only members of said State Tax Commission. Under and by virtue of the terms of enrolled House Bill No. 111, enacted by the General Assembly of Kentucky at the session for the year 1930 (Chapter 149, Acts of 1930, Pages 475-482), the State Tax Commission is charged with [fol. 6] the duty of preparing blank forms for, and ascertaining information from, certain retail merchants operating stores as defined in said Act, and of determining the tax due from said retail merchants, and of employing clerical and other assistance to carry out said Act, and generally to administer and enforce the provisions thereof.

Clell Coleman, one of the defendants herein, is the duly elected, qualified and acting Auditor of Public Accounts of Kentucky, and is charged under said Act with the duty of collecting and disbursing the taxes levied and assessed under the terms of and pursuant to said Act.

3. The amount in controversy in this cause exceeds the sum or value of Three Thousand Dollars, exclusive of interest and costs.

4. This is a suit of a civil nature in equity, and is brought for the purpose of enjoining the defendants from enforcing or attempting to enforce, an Act of the General Assembly of Kentucky, bearing the title:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words "retail merchants" are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; de-

claring an emergency to exist, and repealing all laws in conflict with the provisions of this Act."

Said Act is known as House Bill No. 111, and was read, passed, enrolled and signed under the title:

"H. B. 111. An act to restrain the unfair competition of chain stores and in aid of individual merchants of the Commonwealth."

[fol. 7] 5. The plaintiff, for more than twenty-five years continuously last past, has been engaged in the Commonwealth of Kentucky, and in other states of the United States, in the business of selling at retail, groceries, fruits, vegetables, poultry, meats, milk, butter, cheese, eggs and other food, meats and dairy products and goods commonly sold in grocery and meat stores.

In the course of such business, the plaintiff is engaged in interstate commerce in that a substantial portion of the above mentioned foodstuffs and merchandise is bought or purchased by the plaintiff in other states of the United States and is shipped to plaintiff into the Commonwealth of Kentucky, and is sold by plaintiff at retail, and in many cases in the original containers and packages. The plaintiff in the course of such business raises and produces on farms operated by the plaintiff in the State of Ohio a portion of the garden and farm products sold in said stores in Kentucky, including beef, veal, pork, lamb, mutton, poultry, eggs, potatoes and various dairy, meat and garden products, which are processed in plants owned and operated by the plaintiff in the State of Ohio and are then shipped and transported into the Commonwealth of Kentucky, where said garden and farm products are sold at retail by the plaintiff in its stores in the Commonwealth of Kentucky, and plaintiff is actually engaged in gardening and farming in the State of Ohio, and in selling garden and farm products in the Commonwealth of Kentucky.

The plaintiff, long prior to and at the time of the enactment of said statute, was the owner of a large number of retail grocery stores in the Commonwealth of Kentucky, and is now the owner of Two Hundred and Sixty-Three retail grocery stores in said Commonwealth, all of which [fol. 8] are operated and maintained in separate locations

in various, numerous, different, and frequently widely separated parts of said state. Each of said stores is in charge of a local store manager. All of said stores are subject to different competitive conditions depending upon the type of store, the character of competition, the locality, and numerous other factors which make each store a separate retail store, but all of said stores are owned, operated and controlled by plaintiff.

For many years last past the plaintiff has invested its capital in its said business in the Commonwealth of Kentucky, in warehouses, stores, leaseholds, fixtures, merchandise and other property, having a total value in excess of One Million Five Hundred Thousand Dollars, and plaintiff has been for many years last past, and is, a taxpayer in the Commonwealth of Kentucky, paying large sums for license, occupational, personal and real property taxes, and has paid for preceding years all taxes levied by the State, Counties and Municipalities in which its stores are situated, the same as other store owners and taxpayers similarly situated.

During the calendar year of 1929, the total gross retail sales of the plaintiff in all of said stores in the Commonwealth of Kentucky were $13,807,820.00, and for the calendar year of 1930 it is estimated that said sales have been approximately $12,000,000.00, the exact amount not being possible of immediate ascertainment at this time. The annual sales of each store for the calendar year 1929 averaged $51,468.00 per store. The average sales of each store for the year 1930 approximate $50,000.00 for each store. The gross sales by plaintiff during the period from March 17, 1930, to date have been in excess of $10,000,000.00.

[fol. 9] There is in each of the localities where the stores of plaintiff are situated, a large number of individuals, copartnerships and corporations engaged in business in said localities in Kentucky, which own and operate one store carrying on a business similar to that carried on by plaintiff, under similar circumstances, and doing a very much larger volume of business, and having larger gross retail sales than the store owned by the plaintiff which directly competes therewith. The plaintiff in its stores carries on business in every way exactly as business is carried on in stores which are separately owned by one individual, copartnership or corporation. The plaintiff deals in the

same character of articles and merchandise, and sells to the same public, and plaintiff's business is distinguishable from that of a person, co-partnership or corporation operating only one store, in no way whatsoever, except that in plaintiff's case, the plaintiff owns more than one store, while in the case of such others, the owner owns and operates but one store.

The ownership of more than one store in separate and distinct locations does not increase the fire hazard, injure the health and morals of the community, or require increased or additional public protection.

6. There is a large number of persons, firms, corporations, associations, and co-partnerships, foreign and domestic, lawfully engaged in the operation of more than one store or more than one separate or distinct department under the same management, for the sale of goods, wares and merchandise at retail in the Commonwealth of Kentucky, who are in a like situation with plaintiff. The owners of said stores are too numerous to join in this action, and plaintiff prosecutes this case on its own behalf, and on [fol. 10] behalf of all other individuals, firms, associations, co-partnerships and corporations who are at the time engaged in the operation of two or more stores and two or more separate distinct departments under one management, for the purpose of enjoining the defendants from enforcing, or attempting to enforce, said Act of the General Assembly of Kentucky aforesaid, against plaintiff and such other individuals, firms, associations, co-partnerships and corporation, owning or operating two or more stores and two or more separate distinct departments, under one management, and others similarly situated with the plaintiff, in the Commonwealth of Kentucky.

The question of the invalidity of said statute is one of common and general interest to all of said class of persons within the meaning of Equity Rule No. 38.

7. The General Assembly of Kentucky at its 1930 session, enacted House Bill No. 111 (Chapter 149, Acts of 1930, pages 475-482), which was approved by the Governor and purported to become effective March 17, 1930. Said Act was and is in words and figures as follows, to-wit:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words

'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act. Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

Section One. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, associa- [fol. 11] tion, co-partnership or corporation opening, establishing, operating or maintaining any 'store' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State; except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store' as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Section Two. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows: One-twentieth of one per cent of the gross sales of Four Hundred Thousand (Four hundred thousand Dollars) Dollars or less: two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand (Four hundred thousand dollars) Dollars and not exceeding Five hundred thousand (Five hundred thousand dollars) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand (Five hundred thousand dollars) Dollars, and not exceeding Six hundred thousand (Six hundred thousand dollars) Dollars; eight twentieths of one

per cent on the excess of the gross sales over Six hundred thousand (Six hundred thousand dollars) Dollars, and not exceeding Seven hundred thousand (Seven hundred thou-
[fol. 12] sand dollars) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand (Seven hundred thousand dollars) Dollars and not exceeding Eight hundred thousand (Eight hundred thousand dollars) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand (Eight hundred thousand dollars) Dollars and not exceeding Nine hundred thousand (Nine hundred thousand dollars) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand (Nine hundred thousand dollars) Dollars, and not exceeding One million (One million dollars) Dollars; one per cent on the excess of the gross sales over one million (One million dollars) Dollars.

Section Three. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require. The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission, from such reports, and from such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascer-
[fol. 13] tain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant, the amount of such tax due by each retail merchant, as defined herein, and it shall be the

duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter. In reporting the gross sales for the year, One thousand nine hundred and thirty, retail merchants shall include only those sales made between the date that this act becomes effective and December Thirty-one. One thousand nine hundred and thirty, and the license tax due for the year One thousand nine hundred and thirty shall be based on the amount of those sales only.

Section Four. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

Section Five. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue [fol. 14] agent's proceedings under Section Four thousand two hundred and sixty-three-four of the Kentucky Statutes. The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in Section Four thousand two hundred and sixty-three-four of the Kentucky Statutes.

Section Six. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it,

is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of any action for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verifications [fol. 15] herein required to be made, shall be confidential, and any person divulging such information shall be guilty of misdemeanor and upon conviction shall be fined not exceeding Five hundred (Five hundred dollars) Dollars; provided, that this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings for the collection of any tax due under the provisions of this act, or any prosecutions for any other infraction of the tax laws of the State.

Section Seven. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect, or refuse to make the reports and pay the tax herein prescribed, or shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records,

papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of misdemeanor, and upon conviction shall be fined not exceeding One thousand (One thousand dollars) Dollars, and in case the offender is an individual he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section Five of this Act.

Section Eight. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

Section Nine. All taxes collected under the provisions [fol. 16] of this act shall be paid to the Auditor of Public Accounts, and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

Section Ten. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax or any part thereof, was wrongfully collected for any reason, it shall be the

duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.

Section Eleven. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provisions or the particular penalty held to be invalid may be rejected with-[fol. 17] out affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

Section Twelve. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

Section Thirteen. Whereas, The present state revenue does not meet the immediate needs for the maintenance and development of the State Government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor."

8. Said Act was deliberately designed and intended to, and in practical operation and effect said Act does, destroy, oppress, prohibit, restrain and arbitrarily discriminate against the lawful business of the owners of two or more retail stores, and the owners of two or more separate departments under one management.

Said design and intent was set forth in the title of said Bill as introduced and read in the House of Representatives of the General Assembly of Kentucky, to-wit:

"H. B. No. 111, An Act to restrain the unfair competition of chain stores and in aid of individual merchants of the Commonwealth."

Said bill, as enacted, was read only by the aforesaid title at the time of its second and third reading and passage in said House of Representatives, and said bill was reported by the Committee of Enrollment only by said title, and was thereupon signed by the Speaker of the House and the President of the Senate of the General Assembly of Kentucky.

[fol. 18] 9. Under and by virtue of the terms of said Act hereinbefore set out, if the same should be held valid, the plaintiff in order to conduct its lawful business, and to open, establish, operate or maintain any store or stores in the State of Kentucky, would be required to file a written report with the State Tax Commission on or before February 1, 1931, and each year thereafter, of the total gross sales of all its stores for the preceding year ending December 31, and would be required to pay, approximately thirty days thereafter, a license tax on the total gross sales of all its stores without reference to the sales per store, as follows, to-wit:

1/20th of 1% on the first $400,000.00 of sales.....	$200.00 Tax
2/20th of 1% on the next $100,000.00 of sales.....	100.00 Tax
5/20th of 1% on the next $100,000.00 of sales.....	250.00 Tax
8/20th of 1% on the next $100,000.00 of sales.....	400.00 Tax
11/20th of 1% on the next $100,000.00 of sales.....	550.00 Tax
14/20th of 1% on the next $100,000.00 of sales.....	700.00 Tax
17/20th of 1% on the next $100,000.00 of sales.....	850.00 Tax
1% on the excess over $1,000,000.00 of sales.....	$110,000.00 Tax
Total Tax on $12,000,000.00 of sales.....	$113,050.00 Tax

Pursuant to the terms of said statute, plaintiff would be required to pay an annual tax on the gross retail sales of all of its stores combined of nearly One (1%) Percent of every sale, which tax on gross sales of $12,000,000.00 would equal $113,050.00.

By Section 5, of said Act, any retail merchant who fails to file the report and pay the tax as required herein, is subject to a penalty of 20% plus 6% interest, with an additional penalty of 20% if collected by proceedings in any court. By Section 7, any retail merchant or any officer, director, trustee or agent, who fails to make the report and

pay the tax prescribed in said Act, in whole or in part, is deemed guilty of a misdemeanor and is subject to a fine of $1,000.00 and to imprisonment in the County Jail, not ex- [fol. 19] ceeding six months, or to both fine and imprisonment, in addition to the penalties imposed in Section 5.

Said Act was declared an emergency measure and became effective March 17, 1930. Section 8 thereof, empowers the defendants, members of the State Tax Commission, to incur expenses and costs for the enforcement and administration of said Act, to be paid out of the funds collected thereunder.

Plaintiff is informed and believes and alleges upon such information and belief, that the defendants are preparing for the administration and enforcement of said Act, and have already expended monies out of the State Treasury for the purpose of preparing blank forms and reports necessary to carry out the provisions of said Act, and unless enjoined and restrained by this Court, all of the defendants hereto will administer said law and expend funds raised by taxation in an amount in excess of Five Thousand ($5,000.00) Dollars for the enforcement thereof, and will require the plaintiff and all other retail store owners not exempt under the exemptions hereinafter set forth, to pay the taxes prescribed by said Act, and upon the failure of said store owners, including the plaintiff, to make said payments, the said defendants will attempt to enforce against them, including this plaintiff, the drastic penalties provided for by Sections 5, and 7, of said Act, and will attempt to enforce against them, including the plaintiff, any other penalties or causes of action provided for by the statute of General Laws of the Commonwealth of Kentucky, all to the irreparable injury and damage of plaintiff and other store owners similarly situated.

10. Said Act, hereinbefore set out (Chapter 149, Acts of 1930, Pages 475-482), is unconstitutional, invalid and void for the following reasons and each of them:

[fol. 20] First. Said Act violates the provisons of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the plaintiff, and all other taxpayers similarly situated, of its and their property without due process of law, and denies to the plaintiff, and all others

similarly situated, the equal protection of the laws in the following particulars:

(a) Said Act is, in effect, a tax measure and has nothing to do with the exercise of the police power of the state. It has no relation to the public health, and public welfare, the public morals, or the public safety. It is not an attempt to regulate the business of any corporation or individual whose business is affected with a public interest. It is not an inspection measure in which fees are prescribed for the purpose of covering the cost of making inspection. No provision is contained in said Act for regulation, supervision or inspection. No standards are prescribed for the conduct of the business subject to said tax. As a tax measure, its operation and effect is not equal or uniform, and the classification made by the terms of the Act is deliberately and designedly oppressive, prohibitory, unreasonable, arbitrary, discriminatory, and in the higher brackets is confiscatory as to the plaintiff and other taxpayers similarly situated.

(b) Although said act purports to apply to every retail merchant operating any store as defined in said Act, except those actually engaged in gardening or farming and selling garden or farm products raised by them in Kentucky, the true design, intent, practical operation and actual effect of said Act is to exempt from the payment of said tax practically all of the owners of individual and single unit stores and to impose substantially the entire burden of said tax [fol. 21] upon a small part of the taxpayers, viz: taxpayers owning two or more separate stores and/or two or more separate and distinct departments operated under the same management or ownership and having gross retail sales over four hundred thousand dollars. Section 4 of said Act provides that the license or excise tax levied therein shall not be in lieu of any special state license, excise, occupational or corporation tax due under the provisions of any law now in force, or that may hereafter be enacted. Said Section of said Act, however, provides that any retail merchant, as defined herein, who is liable for and pays any special state license, excise, occupational or corporation license tax, under the laws now in force or hereafter enacted, may take credit on the tax levied under said Act

for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied under said Act. Said credit allowed by the terms of said Act was known at the time of the enactment of said Act to be, and is, sufficient in practically all cases entirely to offset the relatively small tax levied under said Act on sales of retail merchants, as defined herein, which do not exceed four hundred thousand dollars. The tax levied under said Act is only fifty (50¢) Cents per thousand dollars of sales on the first four hundred thousand dollars of gross sales. There are comparatively few, if any, retail merchants in the State of Kentucky whose gross retail sales in an individual or single store, or department, exceeds four hundred thousand dollars per annum. The gross retail sales of practically all of said individual or single stores or departments are under one hundred thousand dollars per annum. The result of the credit which said stores are permitted to take for the amount of such special license, excise, occupational [fol. 22] and corporation license taxes paid by them is that substantially all of the retail merchants owning individual or single unit stores or departments will be, and are, and were so intended to be exempt from the payment of any tax under the terms of said Act, and thus, as to them, such special license, excise, occupational and corporation license taxes as are paid by them are levied upon and collected from them in lieu of any license tax provided for by said House Bill 111, enacted as Chapter 149, Session Acts of 1930. In practical effect and operation only retail merchants who own or manage more than one separate store or more than one separate department, and which have gross retail sales in all said stores and departments aggregating in excess of four hundred thousand dollars, will be, and are, subject to taxation under said Act; and such retail merchants are a very small and limited class in the Commonwealth of Kentucky. There is no basis for said exemption and classification created by said Act and said exemption is unjust, unreasonable, discriminatory and arbitrary.

The plaintiff paid, during the year 1929, in the Commonwealth of Kentucky for special state license, excise, occupational and corporation license taxes, under the provi-

sions of laws now in force, the sum of $16,488.50 and has paid approximately the same amount during the year, 1930, being an average of $62.32 for each of its 263 stores. All other grocery stores in competition with the plaintiff in the Commonwealth of Kentucky pay in said special taxes approximately the same sum per store as paid by the plaintiff. The amount of special taxes so paid is permitted by this Act to be deducted from the amount of taxes assessed under this Act, so that in practical effect and operation a retail merchant having sales of $300,000.00 or less will not be required to pay any taxes under this Act.

[fol. 23] (c) Section 1, of said Act provides that it shall be construed to apply to "every retail merchant" and "store" as defined therein, which is controlled or held with others by majority of stock ownership or ultimately controlled or directed by one management or association of ultimate management. The design, intent, practical operation and effect of said provision is to require and compel the owner or management of two or more separate and distinct stores and/or departments as defined in said Act, to aggregate for the purposes of taxation the gross sales of all stores and/or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores and/or departments may be separate and distinct enterprises; without regard to their location and without regard to the fact that said stores, and/or departments, are each engaged in the sale at retail of wholly different merchandise and commodities unrelated to the merchandise and commodities sold in other stores, and/or departments. The design, intent and practical operation of said Act is thereby to tax, penalize and, because of the increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership, and to tax, penalize and in effect prohibit the employment of capital, skill, efficiency and economy in the operation of such stores under one management or cooperatively under an association of management. Said Act, by reason of its application to all retail merchants and stores, which are now controlled or held with others by

majority stock ownership, and which are now controlled or directed by one management or association of ultimate [fol. 24] management, is a deprivation of the property rights of the plaintiff and is prohibitive, oppressive, confiscatory, unreasonable and arbitrary and denies to the plaintiff and other taxpayers similarly situated, the equal protection of the laws and deprives it, and others similarly situated of its and their property without due process of law.

(d) The classification made as a basis for the tax imposed rests wholly upon gross retail sales and the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,000.00, unequally, disproportionately, arbitrarily, and with the sole design and intent to burden, oppress, prohibit and discriminate against the ownership or ultimate management of two or more stores or separate and distinct departments, and unreasonably, unequally and disproportionately to discriminate against, oppress, burden and penalize the employment of capital, skill, efficiency and the ability of retail merchants in the State of Kentucky to increase their sales above four hundred thousand dollars. The rate of tax is one-twentieth of one per cent on the first four hundred thousand dollars of gross sales. The rate of tax is doubled for the next one hundred thousand dollars of sales. The rate of tax is five times as great for the next one hundred thousand dollars of sales; eight times as great for the next one hundred thousand dollars; eleven times as great for the next one hundred thousand dollars; fourteen times as great for the next one hundred thousand dollars; seventeen times as great for the next one hundred thousand dollars; and twenty times as great for all sales in excess of one million dollars. The practical operation and effect of said unequal and disproportionate increase in the percentage of tax per one hundred thousand dollars of increased sales is that a retail merchant who increases his sales one hundred [fol. 25] thousand dollars above four hundred thousand dollars pays as much tax on said one hundred thousand dollars as a retail merchant whose sales are two hundred thousand dollars. For the next one hundred thousand dollar increase, said merchant is required to pay an additional

Two Hundred and Fifty Dollars; for the next one hundred thousand dollar increase, an additional four hundred dollars, or a greater tax on said one hundred thousand dollars of increased sales than the entire tax of a retail merchant whose total sales are five hundred thousand dollars; for the next one hundred thousand dollars of sales, five hundred and fifty dollars, which tax on said one hundred thousand dollars of sales is as great as the total tax of a retail merchant having total sales of six hundred thousand dollars; for the next one hundred thousand dollars of sales the tax is seven hundred dollars; for the next one hundred thousand dollars of sales the tax is eight hundred and fifty dollars; for the next one hundred thousand dollars of sales and for every one hundred thousand dollars of sales thereafter, a tax is assessed of One Thousand Dollars, which is a greater tax per one hundred thousand dollars of sales than the total tax required of a merchant whose total sales are seven hundred thousand dollars. Under said Act, a retail merchant having gross sales in any amount not exceeding three hundred thousand dollars, who increases said sales by one hundred thousand dollars, is only liable to a maximum increase in taxation of $50.00, less his permitted credits, whereas, the plaintiff is subject to a tax of $1,000.00 on every one hundred thousand dollar increase in its sales. Said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary and confiscatory as to this plaintiff and other tax payers similarly situated.

(e) The grocery stores owned by the plaintiff are in [fol. 26] direct, open and free competition, in each and every locality where said stores are located, with a number of other grocery stores selling similar merchandise to the same public under similar circumstances, except that the owners of said stores are not generally the owners of other retail stores. Said singly or individually owned grocery stores in many of the localities in which the stores of the plaintiff are located, although singly or individually owned, are members of large co-operative organizations or associations for the purpose of co-operative buying, advertising and efficient merchandising. Said competitive stores, by reason of membership in said co-operative associations or organizations, although singly or individually owned, enjoy any and all the advantages which may flow from group or

co-operative buying on a large scale, the pooling of purchasing power, the ability to contract for newspaper display, store and other advertising co-operatively and upon a large scale, and for the scientific and efficient arrangement of stores, window displays and the development of merchandising methods through the employment, co-operatively, of experts and others experienced therein. Said co-operative associations combine co-operatively as great or a greater number of stores and have as great or greater purchasing and buying power and have as great or greater advertising and merchandising ability as the plaintiff and other retail merchants who own two or more stores in the Commonwealth of Kentucky. However, said singly or individually owned stores and members of co-operative associations, as aforesaid, although similarly circumstanced and in direct competition with the plaintiff and other retail merchants owning two or more stores, are not required to aggregate or combine for the purpose of taxation or to report for taxation the total sales of all stores in Kentucky [fol. 27] joined together in the same co-operative association or organization, and hence, said competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiff, but in practical operation and effect are practically exempt from any taxation under said Act, whereas, the plaintiff is subject to taxation at the highest rate prescribed in the said Act. By reason thereof, said competitive stores are given undue and unfair economic advantages over the stores of the plaintiff and are in effect aided, helped and subsidized by said Act in their competition with the plaintiff at the expense of the plaintiff.

The average gross sales of the grocery stores owned by the plaintiff in the Commonwealth of Kentucky during the year last past, were approximately fifty thousand dollars per store, as heretofore set forth. The average sales of the grocery stores with which the stores of the plaintiff are in direct, free and open competition, under similar circumstances, will not exceed, except in a relatively few cases, said average sales of the stores owned by the plaintiff in Kentucky. Said individually or singly owned stores, having gross retail sales averaging fifty thousand dollars per store, are only subject under the terms of said Act to a

maximum tax of one-twentieth of one per cent, i. e., Twenty-five Dollars, which amount will be, in practically all cases, entirely offset by the credit of other taxes permitted under Section 4 of said Act, as heretofore set forth. While said stores with which the plaintiff is in competition as aforesaid will not be subject to any tax under the provisions of said Act, or at most, to a tax of Twenty-five Dollars per store, the plaintiff will be required to aggregate for the purposes of taxation the gross retail sales of all its said stores, amounting during the year last past to something in excess [fol. 28] of twelve million dollars and will thereby be required to pay a tax of something in excess of Four Hundred and twenty-nine dollars per store. The result of the operation and effect of said tax practically exempts from taxation the competitors of the plaintiff and requires the plaintiff to pay an excessive prohibitory, oppressive and confiscatory tax in addition to all other taxes on its said stores, and therefore denies to the plaintiff the equal protection of the laws, takes its property without due process of law and its effect upon the plaintiff and other tax payers similarly situated is unjust, unequal, discriminatory and arbitrary.

(f) The classification and graduation made as a basis for the tax imposed rests wholly upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management. Said classification does not rest in any particular upon the ability of the taxpayer to pay said tax. It does not rest in any particular upon the income or earnings from any store or stores. It has no necessary relation to receipts. It is imposed regardless of whether said sales are made at a profit or loss or the amount of profit or loss therefrom. It has no relation to profits or losses, if any accrue from said sales, It has no relation whatsoever to the capital employed or invested. It does not take into account the type of business. Said Act does not make any provision for the merchandise returned, for the cancellation of sales or resales of merchandise or the net amount of sales, or sales on credits for which payment is not received, but classifies sales solely as to the gross amount thereof by dollars, and strikes at the increase in said gross sales by a geometrical increase in the rate of

[fol. 29] taxation, as heretofore set forth, per one hundred thousand dollars of increased sales up to one million dollars, after which the increase of gross sales above one million dollars, and the tax thereon is levied and collected at the highest bracket of one per cent.

Although said Act purports to classify and tax sales by dollars, it taxes the dollar of sales of certain retail merchants upon a materially and substantially different rate and basis than the dollar of sales of retail merchants engaged in direct competition and similarly circumstanced, and imposes upon a merchant having gross sales of eight hundred thousand dollars, a tax of Fifteen Hundred Dollars, or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, to-wit, four hundred thousand dollars, who is only subject to a tax of two hundred dollars.

Thereby, one retail merchant doing exactly twice the business of his competitor is required to pay seven and one-half times as much tax on his dollar of sales as his competitor, who, in the same class and similarly circumstanced, is required to pay on his dollar of sales. Said classification is unreasonable, without a rational basis, and is arbitrary, unequal, burdensome and oppressive.

The Act in question, although directly imposing a tax, makes it unlawful for a person, engaged in lawful business, viz., the operation of a store, to continue to engage in such business and to operate or maintain any store or stores, or to open or establish such business without paying the so-called license or excise taxes levied therein, although said Act is not based on an exercise of the police power and said Act imposes heavy penalties upon the person or corporation failing to make the reports and to pay the tax prescribed therein, and obedience is thus coerced to an invalid law by [fol. 30] excessive and drastic penalties.

(h) The General Assembly of Kentucky has no right under the guise of an excise or licensing measure to require the owner of a store or stores engaged in a lawful business to pay a tax as a condition precedent to the continuance of that business where the so-called licensing feature has no relation to the public health, the public welfare, the public morals, or the public safety.

(i) The efficient and successful method of conducting retail business in the Commonwealth of Kentucky and else-

where in the United States, at the present time, is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales and to secure a more rapid turnover of merchandise and capital. The retail merchant is required by reason of a small percentage of profit on a single sale to have a large volume of sales and continuously to increase his sales volume in order to secure a fair return on the capital employed by him in his business. The highly competitive character of the grocery business, in which this plaintiff is engaged, and other retail business in the Commonwealth of Kentucky and elsewhere in the United States, makes it necessary for the plaintiff to meet such competition and to conform its practice and methods of retail merchandising, selling and distribution to the accepted standards for the efficient and successful conduct of such business. In conformity therewith, the plaintiff has built up and developed in the Commonwealth of Kentucky and elsewhere a large and valuable business, upon the basis of selling meats, groceries, and other articles at retail to the [fol. 31] public, at the lowest possible prices, consistent with a small average profit in individual sales. The plaintiff is dependent upon a large volume of sales in order to secure a fair, reasonable and adequate return upon its invested capital employed in the conduct of its business. Such merchandising methods are the basis of the business of the plaintiff, are of benefit to the general public of the Commonwealth of Kentucky and have brought to the plaintiff a large and valuable good will and a large sales volume. The profit which the plaintiff is endeavoring to make in order to sell its merchandise at the lowest possible price and to encourage the patronage of the public, has not averaged in excess of one and one-half to two per cent on its gross sales and the plaintiff has actually sustained a loss of seventy-six one-hundredths of one per cent on its gross sales in the Commonwealth of Kentucky for the calendar year 1929, and will sustain a similar or greater loss in the calendar year 1930.

Said Act, by levying a so-called excise or license tax, amounting to practically one per cent on all gross sales made by the plaintiff, and others similarly situated, in practical operation and effect, makes it impossible for the plaintiff to continue the operation of its lawful business within

the Commonwealth of Kentucky at a profit and confiscates under the guise of taxation from one-half to two-thirds of any possible profit arising from sales made by the plaintiff in the Commonwealth of Kentucky. By reason of its ownership of warehouses and stores, frequently under long term leases, and its investments in improvements to leaseholds, fixtures and other property, the plaintiff cannot withdraw from business in the Commonwealth of Kentucky without sacrifice and at a tremendous loss of all of said property, and without losing the value of its good will built up by the [fol. 32] expenditure of vast sums of money, through a period of many years, and without subjecting itself to liability amounting to many thousands of dollars. In consequence of the foregoing facts, said tax as applied to the plaintiff and others similarly situated, is prohibitory and confiscatory and in practical effect and operation is destructive of and takes the property of the plaintiff without any process of law.

(j) Said Act imposes an arbitrary and illegal tax in that it attempts to raise revenue by arbitrarily discriminating against retail merchants who have developed and built up their business in reliance upon a large sales volume and a small average profit therefrom instead of a larger profit from a smaller volume of business and arbitrarily increases the rate of taxation against such merchants.

Second. Said Act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it is an unwarranted abridgment of the privileges and immunities guaranteed to the plaintiff by said Fourteenth Amendment, in each of the following particulars:

(a) Said Act in its provisions is partial, unreasonable, arbitrary and unequal.

(b) The classification fixed by said law rests upon no sound or reasonable basis, but is wholly arbitrary.

(c) Said Act requires the plaintiff and other persons, co-partnerships and corporations engaged in a lawful business; to-wit, the operation of two or more stores, to pay a license or excise tax as a condition precedent to continuing in said business although said Act was not passed in the exercise of the police power but is purely a tax measure.

[fol. 33] (d) The tax fees required to be paid under the terms and provisions of said Act are unequal and discriminatory, based upon a classification that is wholly arbitrary and unjust, and discriminates against the owners and operators of two or more stores, and/or two or more separate and distinct departments, having total gross retail sales in excess of four hundred thousand dollars, in favor of persons, co-partnerships and associations owning and operating but a single store or department and/or having sales of four hundred thousand dollars or less.

(e) Said Act is unequal and discriminatory in that said Act discriminates between retail merchants who engage in gardening or farming and sell garden or farm products raised by them in the Commonwealth of Kentucky, and retail merchants who sell garden or farm products in Kentucky which are raised without the Commonwealth of Kentucky, although said retail merchants are all members of the same class and are similarly engaged in the retail trade of selling garden or farm products.

(f) Said Act unequally, unjustly, unreasonably and arbitrarily discriminates in favor of, and excepts from the operation thereof, all retail merchants who actually engage in gardening or farming and selling garden or farm products raised by them in the Commonwealth of Kentucky, although not solely or exclusively engaged in such business, against retail merchants who do not actually engage in gardening or farming and/or do not sell garden or farm products raised by them in the Commonwealth of Kentucky.

Third. Said Act violates the provisions of Article I, Section 8, Subdivision 3, of the Constitution of the United States, and is an attempt, substantially, to burden and inter-
[fol. 34] fere with and regulate interstate trade and commerce, and to levy and impose a tax upon the importation of farm and garden products raised and grown outside of the Commonwealth of Kentucky into the Commonwealth of Kentucky for sale in stores therein, in the following particulars:

(a) Section 1 excepts from the operation of said Act, and from the payment of any tax, those actually engaged in gardening or farming and selling garden or farm products raised by them in Kentucky. Said Act by its terms, pur-

ports to include as retail merchants and to tax the gross sales of all retail merchants who operate a store for the sale at retail of any goods, wares or merchandise, and who do not actually engage in gardening or farming, and the sale of garden or farm products raised and grown in the Commonwealth of Kentucky. The plaintiff is actually engaged in farming in the State of Ohio, and raises and produces on farms in said state various meat, garden and dairy products, which are subsequently processed in the plants of the plaintiff in the State of Ohio, and are shipped and transported from Ohio to Kentucky, and are actually sold by plaintiff in its stores in the Commonwealth of Kentucky. The plaintiff also purchases from farmers and gardeners in various states of the United States large quantities of garden and farm products which are shipped and transported from said states to the plaintiff in the Commonwealth of Kentucky, and are there sold in stores operated by the plaintiff in said state. A number of the competitors of the plaintiff are actually engaged in gardening or farming and selling such garden and farm products raised by them in the Commonwealth of Kentucky, and are therefore excepted from and not subject to the provisions of said Act [fol. 35] or to the payment of any tax thereunder, whereas the plaintiff is subject to and required to pay the tax provided therein. The provisions of said Act hereinabove set forth, constitute a clear discrimination in favor of gardeners and farmers producing garden and farm products in the Commonwealth of Kentucky against the farmers and gardeners of other states. Said tax is made to depend upon the foreign character of the farm and garden produce—that is, its having been raised or having been grown without the Commonwealth of Kentucky—and is therefore an attempt to regulate commerce between the states of the United States. Said tax is imposed upon the sale of farm produce imported from other states and is indirectly an attempt on the part of the Commonwealth of Kentucky to tax the importation of garden, farm and other produce shipped into the Commonwealth of Kentucky from other states of the United States.

Fourth. Said Act violates fundamental principles of uniformity in the matter of taxes levied upon occupations, persons or property upon some reasonable basis of classifica-

tion, as such principles of uniformity are recognized by Section 171, of the Constitution of the State of Kentucky providing that taxes shall be levied and collected for public purposes only, and shall be uniform on all property of the same class subject to taxation within the territorial limits of the authority levying the tax, in each of the following particulars:

(a) Said Act, in its nature and effect, is a tax measure and provides for a rate of assessment and taxation which is not uniform and which requires different property owners of the same class, to-wit: retail merchants, similarly situated, to pay an unequal rate of assessment and taxation. [fol. 36] The plaintiff, because of the fact that it owns and operates 263 stores in the Commonwealth of Kentucky will be required to pay a rate of taxation on its sales per store approximately twenty times as much as the nominal tax apparently but not actually imposed on the sales of other property owners engaged in a similar business in the Commonwealth of Kentucky owning and operating a single competitive store. In actual operation and effect, the credit of the operator of a single grocery store will offset the nominal tax, so that said owner of a single competitive store will not pay any taxes per store, whereas the plaintiff will be required to pay more than $429.00 per store.

(b) Retail merchants are not taxed at a uniform rate graded in proportion to the volume of business done or of sales made, but said taxes are increased upward so that the proportionate increase has no relationship whatsoever to the increase of sales, and increased sales are taxed at an arbitrary and capricious rate, disproportionately and unequally.

(c) Although purporting to tax all retail merchants, said Act, in actual operation and effect, was designed, intended and does single out a limited class of retail merchants, to-wit: those owning two or more stores, and two or more separate and distinct departments, having sales in excess of $400,000, by compelling the owners thereof to aggregate the sales of all stores and departments commonly owned, controlled or managed or associated in one ultimate management, to pay a tax based upon a total of all of said sales when so combined and aggregated, places substantially the entire

burden of said tax upon said limited class, and brings said class under the highest brackets of said tax.

[fol. 37] Fifth. Said Act violates the provisions of Section 181, of the Constitution of the Commonwealth of Kentucky authorizing the General Assembly to provide by general laws only, for the payment of license fees, or special or excise taxes on various trades, occupations and professions, in the following particulars:

(a) Said section as construed by the Court of Appeals of Kentucky, does not authorize the levying of prohibitory, oppressive, burdensome and arbitrary taxes, which prohibit, oppress and unreasonably burden lawful business. Said Act was designed and intended to and in actual operation and effect will prohibit, oppress and unreasonably burden the business of plaintiff and others similarly situated.

(b) Said Act, under the guise of a license tax would take from the plaintiff and others similarly situated, from one-half to two-thirds of its entire possible profits, and thereby make it impossible for the plaintiff by increasing its sales or otherwise, to earn a fair return upon its capital.

10. Unless the defendants, after notice and hearing, are enjoined and restrained from enforcing or attempting to enforce said Act, the plaintiff and all others similarly situated, will sustain irreparable loss and injury for which they have no plain, adequate and complete remedy at law, in each of the following particulars:

(a) The plaintiff and all others similarly situated, will be compelled to pay taxes pursuant to an invalid and unconstitutional enactment, and for which they are not legally liable.

(b) Upon the failure of the plaintiff, and others similarly situated, to pay said illegal taxes, the drastic penalties pro-
[fol. 38] vided by said Act will be attempted to be enforced by the defendants against the plaintiff, and others similarly situated, and as a result thereof plaintiff, and others similarly situated, will be compelled to defend innumerable actions at law brought to recover said taxes and penalties and criminal proceedings brought to impose the criminal penalties provided in Section 7, of said Act, all at great expense and damage.

(c) The defendants will expend public funds raised by taxation for the purpose of preparing to enforce and carry out the provisions of said Act to the irreparable injury and damage of the plaintiff as a taxpayer of the Commonwealth of Kentucky.

(d) If plaintiff and others similarly situated should pay said taxes under protest and be compelled to commence actions to recover the same as provided in Section 10, of said Act, they would be put to large expense for attorneys' fees and court costs, and would be required to bring a multiplicity of actions in order to recover said monies, and said Act contains no provisions of any kind for the reimbursement to plaintiff and others similarly situated, of said large sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs and other expenses.

(e) Said Act contains no provision authorizing or permitting the plaintiff, or others similarly situated, to commence or prosecute any action at law in the courts of the United States for the recovery of any tax paid by it under protest, but plainly attempts to prohibit any remedy whatever in the courts of the United States, and no waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United States as a suit against a state within the meaning of the Eleventh Amendment to the Constitution of the United States. In [fol. 39] consequence whereof, the plaintiff and others similarly situated, do not have a plain, adequate and complete remedy in an action at law in the courts of the United States.

The only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer and paid by him under protest, all of which appears from Section 10, of said challenged Act of 1930, and from Section 162, Kentucky Statutes, these being the only statutes of the State of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the State of Kentucky.

By no other statute has the Commonwealth of Kentucky ever consented in any way to be sued itself or through any of its officers for the recovery of taxes illegally exacted from a taxpayer and covered into the Treasury of the State.

(f) If, in the event plaintiff was successful in obtaining a judgment for the recovery of such tax paid under protest, the Auditor of Public Accounts did not issue his warrant on the Treasury of the Commonwealth of Kentucky for the amount of such tax and interest as provided in said Act, the courts of the United States would not have jurisdiction of an action in mandamus to require the Auditor to issue said warrant and by reason thereof, the plaintiff does not have a plain, adequate and complete remedy at law in the courts of the United States.

(g) Section 9, of said Act, provides that all of the taxes received thereunder shall be divided and that one-half shall [fol. 40] be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said Board, and that the remaining one-half shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth. Should the plaintiff, and others similarly situated, be successful in obtaining a judgment for the recovery of any taxes paid under protest, no provision is made for the payment of said judgment in money, but the remedy of the plaintiff in such event would be limited under Section 10, of said Act, and possibly under Section 162, General Statutes of Kentucky, to the issuance of a warrant by the Auditor of Public Accounts on the Treasurer of the Commonwealth of Kentucky, for the amount of said tax, with legal interest thereon from the date of payment, which warrant by the provisions of said Act is made payable only out of the general fund of the State. Said tax collected under the provisions of said Act would not go into the general fund of the Commonwealth of Kentucky, but one-half to the Board of Charities and Corrections and one-half to liquidate the public indebtedness as aforesaid, and plaintiff is informed and believes, and alleges upon information and belief that there are not sufficient funds in the general fund of the Commonwealth of Kentucky immediately, or within a reasonable time, to redeem and pay all of said state warrants heretofore

and hereafter to be drawn on said fund, and that it is the practice and procedure of the Treasurer of the Commonwealth of Kentucky, to redeem and pay said warrants in the order in which the same are issued and that said warrants are for this and other reasons, not readily redeemable, saleable or bankable immediately for their face value, and are subject to [fol. 41] delay in payment. Wherefore, the plaintiff would be unable to obtain full, adequate and complete relief in an action at law, and whether it would be able to obtain a return of any taxes illegally paid under said Act would be dependent upon the condition of said general fund at the time thereof, and what, if any appropriations, the General Assembly of Kentucky would, in its discretion, be willing to make thereto and therefor.

(h) Said Act is ambiguous and doubtful as to its application and meaning, and as to the procedure and requirement thereunder, and has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(i) The amount of said tax which the plaintiff would be required to pay under the terms of said Act will be in excess of $113,000.00, which is a substantial portion of the capital invested by the plaintiff in the Commonwealth of Kentucky, and needed by the plaintiff to carry on its business therein. The payment of so large a sum of money will impair the ability of the plaintiff to operate its business in Kentucky and will substantially decrease the amount of annual business which it will be enabled to do, and will give competitors of the plaintiff who are not required to withdraw any money from their respective businesses or who are not required to withdraw a proportionate sum therefrom, an unfair and undue advantage over the plaintiff, for which the plaintiff has no plain, adequate and complete remedy at law.

(j) Section 6 of said Act authorizes the State Tax Commission to have an attachment against the property of the defendant, including garnishees, without the execution of a bond, upon the filing of an affidavit showing the nature of the [fol. 42] claim, that it is just, the sum which the defendant, the State Tax Commission, believes it ought to recover, and that the collection will be endangered by delay in obtaining judgment. The enforcement of such drastic provisions and the other provisions of said Act against the plaintiff, and others similarly situated, will result in a substantial diminu-

tion of the value of the property employed by them respectively in their business, which loss will be large in amount, and will substantially decrease the amount of annual business done by them respectively, but which amount cannot be measured by any damages.

(k) The enforcement of said Act will have the effect of injuring and impairing all lawful business in which the plaintiff and others similarly situated are engaged and in which they have the undoubted right to engage, and which right is guaranteed by the State and Federal Constitutions.

Inasmuch, therefore, as the plaintiff is without adequate remedy at law, and can obtain relief only in a court of equity, the plaintiff prays:

1. That writs of subpœna be issued to each of said defendants, requiring each of them to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived as to each and all of said defendants.

2. That a temporary restraining order be issued, restraining the defendants and each of them, from enforcing said Act against the plaintiff and all others similarly situated, under the provisions of the Act of the Kentucky Legislature hereinbefore set out, and that each and all of said defendants and their successors in office be enjoined and restrained, after final hearing, from enforcing against the plaintiff and all others similarly situated, the provisions of [fol. 43] House Bill No. 111 of the General Assembly of Kentucky (Chapter 149, Acts of 1930, Pages 475-482); directly or indirectly from instituting or maintaining any actions at law or suits in equity to recover of or from the plaintiff, and others similarly situated, the tax complained of, or for the recovery of any of the penalties prescribed in said tax for the nonpayment thereof; from expending any monies received by taxation or otherwise; from enforcing or preparing for the enforcement of said Act complained of, and from taking any steps looking to the exclusion of the plaintiff and/or other persons similarly situated, from carrying on its and/or their business in the Commonwealth of Kentucky, and from taking any steps looking to the prosecution of the plaintiff, its agents, servants, or employees, or any person, firm or corporation similarly situ-

ated in the Commonwealth of Kentucky, and their agents, servants and employees, for a violation of said Act, and from in any manner interfering with the carrying on and operation of such business in the Commonwealth of Kentucky.

3. That upon the final hearing of said cause, this court will order, adjudge and decree that House Bill No. 111 of the General Assembly of Kentucky, passed at a session of 1930 (Chapter 149, Acts of 1930, Pages 475 to 482), entitled: "An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act," be declared unconstitutional, null and void, as violating the Constitution of the United States [fol. 44] and that of the Commonwealth of Kentucky, in the particulars hereinbefore pointed out, and that the enforcement thereof be perpetually enjoined; and for all other and further and general relief, as may be just and equitable in the premises.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, Ohio; Trabue, Doolan, Helm & Helm, Louisville, Kentucky, Solicitors for Plaintiff.

Duly sworn to by Albert H. Morrill. Jurat omitted in printing.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

APPLICATION FOR INTERLOCUTORY INJUNCTION—Filed Jan. 10, 1931

The plaintiff in the above entitled cause hereby applies to the Court for an interlocutory injunction, as prayed for in its Bill of Complaint, suspending restraining and enjoining the enforcement, operation and execution of House Bill No. 111, enacted by the General Assembly of Kentucky, at its

session for the year 1930, and known as Chapter 149, Acts of 1930, pages 475-482, and restraining and enjoining the defendants and the action of any officer of the State of Kentucky in the enforcement and execution of such statute and in the enforcement or execution of any order made by any administrative Board of Commission acting under and pursuant to such statute against the plaintiff and all others similarly situated.

And the plaintiff requests that its application for an interlocutory injunction be heard before three Judges, as prescribed in such case made and provided, and that said interlocutory injunction continue in force until the final hearing herein.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Attorneys for Plaintiff.

[fol. 46] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed Jan. 12, 1931

Now comes the plaintiff in the above entitled cause and represents to the Court that irreparable loss and damage will result to the Complainant unless a temporary restraining order is granted by this Honorable Court, restraining the enforcement, operation or execution of enrolled House Bill No. 111, enacted by the General Assembly of Kentucky, at its session for the year 1930, being Chapter 149, Acts of 1930, pages 475-482, and the enforcement or execution of such statute or any order made by any Board or Commission acting thereunder, until the hearing and determination of the application for an Interlocutory Injunction, as prayed for in the Bill of Complaint.

Wherefore, the plaintiff moves the Court for a temporary restraining order, suspending, restraining and enjoining the enforcement, operation and execution of said enrolled House Bill No. 111, enacted by the General Assembly of Kentucky, being Chapter 149, Acts of 1930, pages 475-

482, and the enforcement or execution of such statute or of any order made by any administrative Board or Commission acting under and pursuant to such statute, until the hearing and determination of the application of the plain-
[fols. 47-49] tiff for an interlocutory injunction, as heretofore applied for in the Bill of Complaint and by Motion duly made herein.

Trabue, Doolan, Helm & Helm, Nichols, Morrill, Wood, Marx & Ginter.

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONVENING THREE JUDGE COURT—Filed Jan. 20, 1931

This is an application for interlocutory injunction restraining the defendants in the above named cause from enforcing a statute of the State of Kentucky. The application seeks both an interlocutory injunction and a final order adjudging and decreeing that said statute is unconstitutional and void under the several Articles of the Constitution of the United States.

It appearing therefore that under the provisions of Title 28, Section 380, U. S. C. A. Judicial Court, Section 266, this application and cause should be heard by a Court consisting of three Judges as is provided in the statute governing the procedure in such cases.

Now, therefore, it is ordered this 20 day of January, 1931, that Honorable Arthur C. Denison, United States Circuit Judge and Honorable Charles I. Dawson, United States District Judge be and they hereby are called to my assistance to hear and determine the said application for an interlocutory injunction and for final decree.

It is further ordered that this cause be set for hearing before the Court as constituted on the 7th day of February, [fol. 51] 1931, at 9 A. M. o'clock in the Federal Building in the City of Covington, State of Kentucky.

A. M. J. Cochran, Judge.

[fol. 52] IN UNITED STATES DISTRICT COURT

[Title omitted]

TEMPORARY RESTRAINING ORDER—Filed Jan. 29, 1931

This cause came on to be heard before me on the verified Bill of Complaint of plaintiff, The Kroger Grocery & Baking Company, an Ohio corporation, suing for itself and for all others similarly situated, alleging that House Bill No. 111, enacted by the General Assembly of Kentucky, at its session for the year 1930, and known as Chapter 149, Acts of 1930, pages 475-482, violates and is contrary to the provisions of the Constitution of the United States; and it appearing that said Bill of Complaint prays for an interlocutory injunction restraining the enforcement of said statute and the action of any officer of Kentucky in the enforcement or execution of such statute, and for a temporary restraining order pending the hearing and determination of said application for an interlocutory injunction;

And it further appearing that two Judges having been called to my assistance to hear and determine said application for an interlocutory injunction on the 17th day of January, 1931, at Covington, Kentucky, and at least five (5) days notice of said hearing was given to the Governor and the Attorney General of the Commonwealth of Kentucky, and to the defendants in this cause, as provided by [fol. 53] law.

And the Attorney General of the Commonwealth of Kentucky, on behalf of the defendants herein, having moved for a continuance of said hearing and the Court having granted said motion, set the hearing of said application for an interlocutory injunction before said Court of three Judges for the 7th day of February, 1931 at 9:00 A. M. o'clock, at Covington, Kentucky;

Whereupon, the plaintiff having moved for a temporary restraining order pending the hearing and determination of its application for an interlocutory injunction and due notice thereof having been given to the defendants and the same having been submitted to the Court; Now, therefore, the Court finds and is of the opinion that irreparable loss and damage will result to the plaintiff unless a temporary restraining order is granted restraining the enforcement of

said statute and the action of any officer of the Commonwealth of Kentucky in the enforcement or execution thereof until the hearing and determination of the application for an interlocutory injunction and that said statute, which is alleged to be unconstitutional, as aforesaid, purports to become effective on February 1, 1931, and that the plaintiff would thereupon be subject to the provisions and penalties thereof and that the defendants are now expending and are about to expend large sums thereunder and will immediately enforce said statute unless restrained and enjoined, all to the irreparable loss and damage of the Complainant and all others subject thereto;

Wherefore, it is ordered, adjudged and decreed that a temporary restraining order issue, suspending, restraining and enjoining the enforcement, operation and execution of enrolled House Bill No. 111, enacted by the General Assembly of Kentucky, at its session for the year 1930, and [fols. 54-56] known as Chapter 149, Acts of 1930, pages 475-482, bearing the title:

"An act relating to revenue and taxation imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act. Be it enacted by the General Assembly of the Commonwealth of Kentucky."

And restraining and enjoining the defendants, John B. Lewis, Selden Glenn, Henry M. Cline and Clell Coleman, and each of them, and any officer of the Commonwealth of Kentucky, their agents, servants, employees and attorneys, from enforcing or executing such statute and from enforcing or executing any order made by any administrative Board or Commission acting thereunder pursuant to such statute, against the plaintiff, The Kroger Grocery & Baking Company, and any other person, firm, corporation, association and co-partnership operating chain stores in the state until February 7th and it can be so determined by the three Judges whether it shall be continued pending the hearing and determination of the application for the interlocutory injunction and that the plaintiff enter into a bond,

payable to the Commonwealth of Kentucky, in the amount of Five Thousand ($5,000.00) Dollars, conditioned according to law.

A. M. J. Cochran, Judge.

Jany 29th, 1931.

[fols. 57-60] In United States District Court

[Title omitted]

Order Permitting Plaintiff to Sue as Representative of Class—Filed Jan. 31, 1931

On motion of plaintiff, based upon its vertified petition herein, it appearing that the issues and questions raised in plaintiff's Bill of Complaint are of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, it is now ordered, pursuant to Equity Rule 38, that plaintiff may sue on behalf of all other persons similarly situated, as well as on its own behalf, as to any issue or question presented by said Bill of Complaint that is of common or general interest to other taxpayers similarly situated, who are affected by said Chapter 149 of the Acts of 1930.

A. M. J. Cochran, Judge.

Jany. 31, 1931.

[fols. 61 & 62] In United States District Court

[Title omitted]

Order Continuing Temporary Restraining Order—Filed Feb. 7, 1931

It appearing that one of the Judges called to my assistance to hear and determine the application for an interlocutory injunction in the above cause cannot be present on February 7, 1931, on account of illness, and that it is necessary to continue the hearing of said application by reason thereof, it is therefore ordered and adjudged that the hearing of said application for an interlocutory injunc-

tion be continued to February 14, 1931, and that said application shall be heard on said date at Covington, Kentucky.

And it is further ordered and adjudged that the temporary restraining order, heretofore entered and issued in this cause on the 29th day of January, 1931, be and the same hereby is continued in full force and effect until the hearing and determination of said application for an interlocutory injunction, as aforesaid.

A. M. J. Cochran, Judge.

February 7, 1931.

[fol. 63] In United States District Court

[Title omitted]

Motion to Dismiss—Filed Feb. 14, 1931

Now comes the defendants, John B. Lewis, Seldon Glenn and H. M. Cline, members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, and move the Court to dismiss the bill of complaint filed in the above entitled case upon the grounds and reasons therefor as follows:

(1) Because it appears in the bill of complaint filed in this case that this action is prosecuted for the benefit and on behalf of citizens and residents of this State to-wit: certain domestic firms, co-partnerships and associations, corporations, and therefore no diversity of citizenship exists, as alleged, upon which basis this Court is alleged to have jurisdiction.

2. That there is insufficiency of fact to constitute a valid cause of action in equity against these defendants.

3. Because it appears in the complaint that plaintiff has a plain, adequate and complete remedy at law.

[fol. 64] 4. Because it appears in the bill of complaint that this is in fact an action against a sovereign State, attempted to be prosecuted by citizens of another State in violation of the Eleventh Amendment of the Federal Constitution.

5. Because it appears in the bill of complaint that plaintiff is, by the act under consideration, prohibited from maintaining any suit in equity to restrain the collection of the tax complained of.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Leslie W. Morris, Solicitor- for Defendants. Batson, Cary & Welch, Howard G. Gentry, of Counsel.

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Feb. 14, 1931

Come the defendants, John B. Lewis, Selden Glenn and Henry M. Cline, as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, and for their answer to the bill of complaint filed in the above styled action, plead as follows:

1. Said defendants do not have sufficient information to answer the allegations contained in Paragraph 1 of the Bill of Complaint and therefore neither admit nor deny the same, but require strict proof thereof.

2. Defendants admit all the allegations contained in Paragraph 2 of the Bill of Complaint.

3. Defendants admit all the allegations contained in Paragraph 3 of the Bill of Complaint.

4. Defendants, for answer to Paragraph 4, deny that this is a suit of civil nature in equity, or is brought for the purpose of enjoining the defendants from enforcing or at-
[fol. 66] tempting to enforce an Act of the General Assembly of Kentucky, bearing the title:

"An act relating to revenue and taxation imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing

fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act."

They deny that House Bill No. 111 was read, passed, enrolled or signed under the title:

"H. B. 111. An act restraining the unfair competition of chain stores and in aid of individual merchants of the Commonwealth."

5. Said defendants do not have sufficient information to answer the allegations contained in Paragraph 5 of the Bill of Complaint and therefore neither admit nor deny the same, but require strict proof thereof.

6. Defendants, for answer to Paragraph 6, deny that there is a large or any number of persons, firms, corporations, associations, or co-partnerships, foreign or domestic, lawfully engaged in the operation of one or more stores or more than one separate or distinct department under the same management, for the sale of goods, wares or merchandise at retail in the Commonwealth of Kentucky, who are in a like position with plaintiff.

Denies that the owners of said stores are too numerous to join in this action or that plaintiff prosecutes this case on behalf of any other individual, firm, association, co-partnership or corporation, who are at this time engaged in the operation of two or more stores or two or more separate, distinct departments under one management, for the purpose of enjoining the defendants from enforcing, or attempting to enforce, said Act of the General Assembly of Kentucky aforesaid, against plaintiff or such other individuals, firms, associations, co-partnerships or corporations, owning or operating two or more stores or two or [fol. 67] more separate, distinct departments under one management, or others similarly situated with the plaintiff in the Commonwealth of Kentucky.

Denies that the question of the invalidity of said statute is one of common or general interest to any or all of the people of Kentucky within the meaning of Equity Rule No. 38.

7. Defendants admit all the allegations contained in Paragraph 7 of the Bill of Complaint.

8. Defendants, for answer to Paragraph 8, deny that said Act was deliberately designed or intended to, or in practical operation or effect does, destroy, oppress, prohibit, restrain or arbitrarily discriminate against the lawful business of the owners of two or more retail stores, or the owners of two or more separate departments under one management; or that said design or intent was set forth in the title of said bill as introduced or read in the House of Representatives of the General Assembly of Kentucky, to-wit:

"H. B. 111. An Act restraining the unfair competition of chain stores and in aid of individual merchants of the Commonwealth."

Deny that said bill was enacted or read only or at all by the aforesaid title at the time of its second or third reading or passage in the House of Representatives by the Committee of Enrollment, or at all, by said title, or was thereupon signed by the Speaker of the House or the President of the Senate of the General Assembly of Kentucky while containing said alleged title.

9. Said defendants do not have sufficient information to answer the allegations contained in Paragraph 9 of the Bill of Complaint and therefore neither admit or deny the same, but require strict proof thereof.

10. Defendants, for answer to Paragraph 10, deny that said Act (Chapter 149, Acts of 1930, Pages 475-482) is un- [fol. 68] constitutional, invalid or void for the alleged reasons set out in said Bill of Complaint, and hereafter referred to separately, or any of them.

First. Deny that said Act violates the provisions of the Fourteenth Amendment of the Constitution of the United States in that it deprives the plaintiff, or other taxpayers similarly situated, of its or their property without due process of law, or denies to the plaintiff, or others similarly situated, the equal protection of the law in the following particulars, or at all:

(a) Deny that said Act is, in effect, a tax measure, or that it has no relation to the police powers of the state; or that it has no relation to the public health, the public welfare, the public morals, or the public safety. Deny that

it is not an attempt to regulate the business of any corporation or individual whose business is affected with a public interest. Deny that it is not an inspection measure in which fees are prescribed for the purpose of covering the cost of making inspection. Deny that no provision is contained in said act for regulation, supervision or inspection; that no standards are prescribed for the conduct of the business subject to said tax; or that as a tax measure, its operation or effect is not equal or uniform; or that the classification made by the terms of the Act is deliberately or designedly, or at all, oppressive, prohibitory, unreasonable, arbitrary, discriminatory, or in the higher brackets, or at all, is confiscatory as to the plaintiff or other taxpayers similarly situated.

(b) Deny that although said Act purports to apply to every retail merchant operating any store as defined in said Act, except those actually engaged in gardening or farming or selling garden or farm products raised by them in Kentucky, the true design, intent, practical operation, or actual effect of said Act is to exempt from the payment of [fol. 69] said tax practically all, or any, of the owners of individual or single unit stores, or to impose substantially the entire burden of said tax upon a small part of the taxpayers, viz: taxpayers owning two or more separate and distinct departments operated under the same management or ownership, or having gross retail sales over four hundred thousand dollars. Defendants deny that the credits for special license, excise, occupational or corporation license tax, allowed by the terms of said Act, were known at the time of the enactment of said Act to be, or are sufficient, in practically all or any cases, entirely to offset the relatively small tax levied on sales of retail merchants which do not exceed four hundred thousand dollars. Deny that there are comparatively few, if any, retail merchants in the State of Kentucky whose gross retail sales in an individual or single store, or department, exceeds four hundred thousand dollars per annum. Deny that the gross retail sales of practically all, of any, of said individual or single stores or departments are under one hundred thousand dollars per annum; or that the results of the credit which said stores are permitted to take for the amount of such special license, excise, occupational or corporation li-

cense tax paid by them is that substantially all, or any, of the retail merchants owning individual or single unit stores will be, or are, or were so intended to be exempt from the payment of any tax under the terms of said Act, or thus, as to them, such special license, excise, occupational or corporation license taxes as are paid by them, or are levied upon or collected from them in lieu of any license tax provided for by said House Bill No. 111.

Deny that in practical effect or operation only retail merchants who own or manage more than one separate store or more than one separate department, or which have gross retail sales in all said stores or departments aggregating in excess of four hundred thousand dollars, will be, or are, subject to taxation under said Act, or that said mer-
[fol. 70] chants are a very small or limited class in the Commonwealth of Kentucky. Deny that there is no basis for said exemption or classification created by said Act, or that said exemption is unjust, unreasonable, discriminatory, or arbitrary.

Defendants deny that all, or any, other grocery stores in competition with the plaintiff in the Commonwealth of Kentucky pay in special state license, excise, occupational or corporation license tax approximately the same sum per store as paid by the plaintiff, or that in practical effect or operation a retail merchant having sales of $300,000. or less will not be required to pay any taxes under this Act.

(c) Defendants deny that the design, intent, practical operation or effect of said Act is to require or compel the owner or management of two or more separate or distinct stores or departments as defined in said Act, to aggregate for the purposes of taxation the gross sales of all stores or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores or departments are separate or distinct enterprises; without regard to location or without regard to the fact that said stores or departments, are each engaged in the sale at retail of wholly different merchandise or commodities unrelated to the merchandise or commodities sold in other stores or departments. Deny that the design, intent, or practical operation of said Act is thereby to tax, penalize, or, because of

the increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership, or to tax, penalize, or in effect prohibit the employment of capital, skill, efficiency or economy in the operation of said stores [fol. 71] under one management or cooperatively under an association of management. Deny that said Act, by reason of its application to all retail merchants or stores, which are now controlled or held with others by majority stock ownership, or which are now controlled or directed by one management or association of ultimate management, is a deprivation of the property rights of the plaintiff or is prohibitive, oppressive, confiscatory, unreasonable or arbitrary or denies to the plaintiff or other taxpayers similarly situated, the equal protection of the laws or deprives it, or others similarly situated, of its or their property without due process of law.

(d) Deny that the classification made as a basis for the tax imposed, rests wholly upon gross retail sales, or that the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,000, unequally, disproportionately, arbitrarily or with the sole, or any, design or intent to burden, oppress, prohibit or discriminate against the ownership or ultimate management of two or more stores or separate or distinct departments, or unreasonably, unequally or disproportionately to discriminate against, oppress, burden or penalize the employment of capital, skill, efficiency or the ability of retail merchants in the State of Kentucky to increase their sales above four hundred thousand dollars. Deny that the practical operation or effect of said increase in the percentage of tax per one hundred thousand dollars of increased sales is that a retail merchant who increases his sales one hundred thousand dollars above four hundred thousand dollars pays as much tax on one hundred thousand dollars as a retail merchants whose sales are two hundred thousand dollars, or for the next one hundred thousand dollar increase, said merchant is required to pay an additional two hundred and fifty dollars; or for the next one hundred thousand dollar increase, an additional four hundred dollars, or a greater tax on said one hundred thousand dollars of

[fol. 72] increased sales than the entire tax of a retail merchant whose total sales are five hundred thousand dollars; for the next one hundred thousand dollars of sales, five hundred and fifty dollars, which tax on said one hundred thousand dollars of sales is as great as the total tax of a retail merchant having total sales of six hundred thousand dollars; for the next one hundred thousand dollars of sales the tax is seven hundred dollars; for the next one hundred thousand dollars of sales the tax is eight hundred and fifty dollars; for the next one hundred thousand dollars of sales and for every one hundred thousand dollars of sales thereafter, a tax is assessed of one thousand dollars, which is a greater tax per one hundred thousand dollars of sales than the total tax required of a merchant whose total sales are seven hundred thousand dollars. Deny that under said act a retail merchant having gross sales in any amount not exceeding three hundred thousand dollars, who increases said sales by one hundred thousand dollars, is only liable to a maximum increase in taxation of fifty dollars, less his permitted credits, or, the plaintiff is subject to a tax of $1,000 on every one hundred thousand dollar increase in its sales. Deny that said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary or confiscatory as to this plaintiff or other taxpayers similarly situated.

(e) Deny that the grocery stores owned by the plaintiff are in direct, open or free competition, in every or each locality where said stores are located, with any other grocery stores selling similar merchandise to the same public under similar circumstances, except that the owners of said stores are not generally the owners of other retail stores. Deny that the singly or individually owned grocery stores in many, or any, of the localities in which the stores of this plaintiff are located, although singly or individually owned, are members of large cooperative organizations or associations for [fol. 73] the purpose of cooperative buying, advertising or efficient merchandising. Deny that said competitive stores, by reason of membership in said cooperative associations or organizations, although singly or individually owned, enjoy any or all the advantages which may flow from group or cooperative buying on a large scale, including the pooling of purchasing power, the ability to contract for newspaper

display, store *as* other advertising, cooperatively or upon a large scale, or for the scientific or efficient arrangement of stores, window displays or the development of merchandising methods through the employment cooperatively, of experts or others experienced therein. Deny that said cooperative associations combine cooperatively as great or a greater number of stores or have as great or greater purchasing or buying power, or have as great or greater advertising or merchandising ability as the plaintiff or other retail merchants who own two or more stores in the Commonwealth of Kentucky. Deny that any singly or individually owned stores, or members of cooperative associations of similar circumstances or in direct competition with the plaintiff or other retail merchants owning two or more stores, are not required to aggregate or combine for the purpose of taxation or to report for taxation the total sale of all stores in Kentucky joined together in the same cooperative association or organization, or hence, said competitive stores members of said association or organization, are not subject to taxation on the same basis, classification or rate as the plaintiff, or are in practical operation or effect practically exempt from any taxation under said act; or that the plaintiff is subject to taxation at the highest rate prescribed in said act; or that by reason thereof, said competitive stores are given undue or unfair economic advantages over the stores of the plaintiff, or are in effect aided, helped or subsidized by said act in their competition with the plaintiff at the expense of the plaintiff.

Deny that the average gross sales of the grocery stores [fol. 74] owned by the plaintiff in Kentucky during the year last past was approximately fifty thousand dollars per store. Deny that the average sales of the grocery stores with which the grocery stores of the plaintiff are in direct free or open competition, under similar, or any, circumstances, will not exceed, except in a relatively few, or any, cases, said average sales of the stores owned by the plaintiff in Kentucky. Deny that individually or singly owned stores will have gross sales averaging only $50,000. per store or will pay a tax of only one twentieth of one percent, i. e. Twenty-five dollars, or that said amount will be in practically all cases entirely offset by the credit of other taxes permitted under Section 4 of said Act. Deny that the stores in competition with the plaintiff will not be sub-

ject to any tax under the provisions of said Act, or at most, to a tax of Twenty-five dollars per store, or that the plaintiff will be required to pay a tax of something in excess of four hundred and twenty-nine dollars per store, or any such amount. Deny that the result of the operation or effect of said tax practically, or at all, exempts from taxation the competitors of the plaintiff, or requires the plaintiff to pay an excessive prohibitory, oppressive or confiscatory tax in addition to all other taxes, or any other taxes, on its said stores or thereby denies to the plaintiff the equal protection of the laws, takes its property without due process of law or its effect upon the plaintiff and other taxpayers similarly situated is unjust, unequal, discriminatory or arbitrary.

(f) Deny that the classification or graduation made as a basis for the tax imposed rests wholly, or at all, upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate man-
[fol. 75] agement; that said classification does not rest in any particular upon the ability of the taxpayer to pay said tax. Deny that it does not rest in any particular upon the income or earnings from any store or stores, or that it has no necessary relation to receipts; that it is imposed regardless of whether said sales are made at a profit or loss, or the amount of profit or loss therefrom; that it has no relation to profits or losses, if any accrue from said sales; that it has no relation to the capital employed or invested. Deny that it does not take into account the type of business. Deny that said Act does not make any provision for the merchandise returned, or for the cancellation of sales or resales of merchandise, or for the net amount of sales, or sales on credits for which payment is not received, or that it classifies sales solely as to gross amount thereof by dollars, or strikes at the increase in said gross sales by a geometrical increase in the rate of taxation; for one hundred thousand dollars of increased sales up to one million dollars, after which the increase of gross sales above one million dollars, or the tax thereon is levied or collected at the highest bracket of one per cent.

Deny that said Act purports to classify or tax sales by dollars; or that it taxes the dollar of sales of certain retail

merchants upon a materially or substantially different rate or basis than the dollar of sales of retail merchants engaged in direct competition or similarly circumstanced, or imposes upon a merchant having gross sales of eight hundred thousand dollars, a tax of fifteen hundred dollars, or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, or who is only subject to a tax of two hundred dollars.

Deny that thereby, one retail merchant doing exactly twice the business of his competitor is required to pay seven and one-half, or any, times as much on his dollar of sales as his competitor, who, in the same or similar cir- [fol. 76] cumstances, is required to pay on his dollar of sales. Deny that said classification is unreasonable, without a rational basis, or is arbitrary, unequal, burdensome, or oppressive.

Deny that the Act in question, although directly imposing a tax, makes it unlawful for a person, engaged in lawful business, viz: the operation of a store, to continue to engage in such business or to operate or maintain any store or stores, or to open or establish such business without paying the so-called license or excise taxes levied therein, although said Act is not based on an exercise of the police power, or said Act imposes heavy penalities upon the person or corporation failing to make the reports or to pay the tax prescribed therein, or obedience is thus, or at all, coerced to an invalid law by excessive or drastic penalties.

(h) Deny that the General Assembly of Kentucky has no right under the guise of an excise or licensing measure to require the owner of a store or stores to pay a tax as a condition precedent to the continuance of that business, where the so-called licensing feature has no relation to the public health, the public welfare, the public morals, or the public safety.

(i) Deny that the efficient or successful method of conducting retail business in the Commonwealth of Kentucky, or elsewhere in the United States, at the present time, is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales or to secure a more rapid turnover of merchandise or capital.

Deny that the retail merchant is required by reason of a small percentage of profit on a single sale to have a large volume of sales or continuously to increase his sales volume in order to secure a fair return on the capital employed by him in his business. Deny that the highly competitive character of the grocery business, in which this plaintiff is [fol. 77] engaged, and other retail business in the Commonwealth of Kentucky or elsewhere in the United States, makes it necessary for the plaintiff to meet such competition or to conform its practice or methods of retail merchandising, selling or distribution to the accepted standards for the efficient or successful conduct of such business. Deny that in conformity therewith, the plaintiff has built up or developed in the Commonwealth of Kentucky or elsewhere a large or valuable business, upon the basis of selling meats, groceries or other articles at retail to the public at the lowest possible prices, consistent with a small average profit in individual sales.

Deny that the plaintiff is dependent upon a large volume of sales in order to secure a fair, reasonable or adequate return upon its invested capital employed in the conduct of its business. Deny that said merchandising methods are the basis of the business of the plaintiff, or are of benefit to the general public of the Commonwealth of Kentucky, or have brought to the plaintiff a large or valuable good will, or a large sales volume. Deny that the profit which the plaintiff is endeavoring to make in order to sell its merchandise at the lowest possible price, or any other reason, or to encourage the patronage of the public, has not averaged in excess of one and one-half to two per cent. on its gross sales, or that the plaintiff has actually sustained a loss of seventy-six one-hundredths of one per cent., or any other amount, on its gross sales in the Commonwealth of Kentucky for the calendar year 1929, or will sustain a similar or greater, or any loss in the calendar year 1930.

Deny that said Act, by levying a so-called excise or license tax, amounting to practically one per cent. on all gross sales made by plaintiff, or others similarly situated, in practical operation or effect, or at all, makes it impossible for the plaintiff to continue the operation of its lawful business [fol. 78] within the Commonwealth of Kentucky at a profit

or confiscates under the guise of taxation, or at all, from one-half to two-thirds of any amount or kind of possible profit arising from sales made by plaintiff in the Commonwealth of Kentucky. Deny that by reason of its ownership of warehouses or stores, frequently under long term leases, or otherwise, or its investments in improvements to leaseholds, fixtures, or other property, the plaintiff cannot withdraw from business in the Commonwealth of Kentucky without sacrifice, or at a tremendous loss of all, or any, of said property, or without losing the value of its good will, built up by the expenditure of vast sums of money, or otherwise, through a period of many years, or any years, or without subjecting itself to liability to many thousands of dollars, or any amount. Deny that in consequence of the foregoing facts, or at all, said tax as applied to the plaintiff or others similarly situated, is prohibitory or confiscatory, or in practical effect or operation is destructive of, or takes the property of plaintiff without any process of law.

(j) Defendants deny that said Act imposed an arbitrary or illegal tax in that it attempts to raise revenue by arbitrarily discriminating against retail merchants who have built up their business in reliance upon a large sales volume, or a small average profit therefrom instead of a larger profit from a smaller volume of business or arbitrarily increases the rate of taxation against such merchants.

Second. Defendants deny that said Act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it is an unwarranted abridgement of the privileges or immunities guaranteed to the plaintiff by said Fourteenth Amendment, in each of the folowing particulars, or at all:

(a) Defendants deny that said Act in its provisions is [fol. 79] *is* partial, unreasonable, arbitrary or unequal.

(b) Defendants deny that the classification fixed by law rests upon no sound or reasonable basis, or that it is wholly or at all arbitrary.

(c) Deny that said Act requires the plaintiff or other persons, co-partnerships or corporations engaged in a lawful business, to-wit: the operation of two or more stores, to pay a license or excise tax as a condition precedent to

continuing in said business, or that said Act was not passed in the exercise of the police power, or that it is purely a tax measure.

(d) Deny that the tax fees required to be paid under the terms or provisions of said Act are unequal or discriminatory, based upon a classification that is wholly arbitrary or unjust, or discriminates against the owners or operators of two or more stores or two or more separate or distinct departments, having total gross retail sales in excess of four hundred thousand dollars, in favor of persons, copartnerships or associations owning or operating but a single store or department or having sales of four hundred thousand dollars or less.

(e) Defendants deny that said Act is unequal or discriminatory in that said Act discriminates against retail merchants who engage in gardening or farming or sell garden or farm products raised by them in the Commonwealth of Kentucky, or retail merchants who sell garden or farm products in Kentucky which are raised without the Commonwealth of Kentucky, although said retail merchants are all members of the same class. Deny that they are all members of the same class, or are similarly engaged in selling at retail garden or farm products.

(f) Defendants deny that said Act unequally, unjustly, unreasonably or arbitrarily, or at all, discriminates in favor of, or excepts from the operation thereof, all, or any, retail merchants who actually engage in gardening or selling [fol. 80] garden or farm products raised by them in the Commonwealth of Kentucky, although not solely or exclusively engaged in such business, against retail merchants who do not actually engage in gardening or farming, or do not sell garden or farm products raised by them in the Commonwealth of Kentucky.

Third. Defendants deny that said Act violates the provisions of Article 1, Section 8, Subdivision 3, of the Constitution of the United States, or that it is an attempt, substantially, or at all, to burden or interfere with or regulate interstate trade or commerce, or to levy or impose a tax upon the importation of farm or garden products raised or grown outside the Commonwealth of Kentucky into the

Commonwealth of Kentucky for sale in stores therein, in the following particulars, or at all:

(a) Defendants deny that Section 1 excepts from the operation of said Act, or from the payment of any tax, those actually engaged in gardening or farming or selling garden or farm products raised by them in Kentucky. Deny that said Act by its terms, purports to include as retail merchants, or to tax the gross sales of all, or any, retail merchants who operate a store for the sale at retail of any goods, wares or merchandise, or who do not actually engage in gardening or farming, or the sale of garden or farm products raised or grown in the Commonwealth of Kentucky. Deny that the plaintiff is actually engaged in farming in the State of Ohio, or raises or produces on farms in said state various meat, garden or dairy products, which are subsequently processed in the plants of plaintiff in the State of Ohio, or are shipped or transported from Ohio to Kentucky, or are actually sold by plaintiff in its stores in the Commonwealth of Kentucky. Deny that the plaintiff purchases from farmers or gardeners in various [fol. 81] states of the United States, or any state, large, or any, quantities of garden or farm products which are shipped or transported from said states to the plaintiff in the Commonwealth of Kentucky, or that said products are sold in stores operated by plaintiff in said State. Deny that a number, or any, of the competitors of the plaintiff are actually engaged in gardening or farming, or selling such garden or farm products raised by them in the Commonwealth of Kentucky, or are therefore excepted from, or not subject to the provisions of said Act, or to the payment of any tax thereunder, or that plaintiff is subject to or required to pay the tax provided therein.

Deny the provisions of said Act constitute a clear, or any, discrimination in favor of gardeners, or farmers producing garden or farm products in the Commonwealth of Kentucky against the farmers or gardeners of other states. Deny that said tax is made to depend upon the foreign character of the garden or farm produce—that is, its having been raised or having been grown without the Commonwealth of Kentucky—or is an attempt to regulate commerce between the states of the United States. Deny that said tax

is imposed upon the sale of farm produce imported from other states or is directly, or at all, an attempt by the Commonwealth of Kentucky to tax the importation of garden, farm or other produce shipped into the Commonwealth of Kentucky from other states of the United States.

Fourth. Defendants deny that said Act violates fundamental principles of uniformity, or any principles of uniformity, in the matter of taxes levied upon occupations, persons or property upon some reasonable basis of classification, as such principles of uniformity are recognized by Section 171 of the Constitution of the State of Kentucky providing that taxes shall be levied or collected for public purposes only, or shall be uniform on all property of the [fol. 82] same class subject to taxation within the territorial limits of the authority levying the tax, in each of the following particulars, or at all:

(a) Defendants deny that said Act, in its nature or effect, is a tax measure or provides for a rate of assessment or taxation which is not uniform or which requires different property owners of the same class to-wit: retail merchants similarly situated, to pay an unequal rate of assessment or taxation.

Deny that the plaintiff, because of the fact that it owns or operates Two Hundred and Sixty-three stores in the Commonwealth of Kentucky, will be required to pay a rate of taxation on its sales per store approximately twenty, or any, times as much as the nominal tax apparently but not actually imposed on the sales of other property owners engaged in a similar business in single or competitive store. Deny that said tax is not actually imposed on sales of property owners owning or operating single competitive stores.

Deny that in actual operation or effect, the credit of the operator of a single grocery store will offset the nominal tax, or that said tax is a nominal tax, so that said owner of a single competitive store will not pay any tax per store, or that the plaintiff will be required to pay more than $429.00 per store, or any sum.

(b) Deny that retail merchants are not taxed at a uniform rate graded in proportion to the volume of business done or of sales made, or that said taxes are increased upward so that the proportionate increase has no relation-

ship whatsoever to the increase of sales, or increased sales are taxed at an arbitrary or capricious rate, disproportionately or unequally.

(c) Defendants deny that although purporting to tax all retail merchants, said Act, in actual operation or effect, or at all, was designed, intended or does single out a limited class of retail merchants, to-wit: those owning two or more [fol. 83] stores, or having two or more separate and distinct departments, having sales in excess of $400,000, by compelling the owners thereof to aggregate the sales of all stores or departments commonly owned, controlled or managed or associated in one ultimate management, to pay a tax based upon a total of all said sales when so combined or aggregated, places substantially the entire burden or said tax upon said limited class, or brings said class under the highest brackets of said tax.

Fifth. Defendants deny that said Act violates the provisions of Section 181, of the Constitution of the Commonwealth of Kentucky, authorizing the General Assembly to provide by general laws only, for the payment of license fees, or special or excise taxes on various trades, occupations or professions, in the following particulars, or at all:

(a) Deny that said Act was designed or intended to, or in actual operation or effect will prohibit, oppress, or unreasonably burden the business of plaintiff or others similarly situated.

(b) Deny that said Act, under the guise of a license tax, or at all, would take from the plaintiff or others similarly situated, from one-half to two-thirds of its entire possible profits, or any of its possible profits, or thereby make it impossible for the plaintiff by increasing its sales or otherwise, to earn a fair return upon the capital.

10. Defendants deny that unless they are restrained or enjoined from enforcing or attempting to enforce said Act, the plaintiff or any others similarly situated, will sustain irreparable, or any, losses or injury for which they have no plain, adequate or complete remedy at law, in each of the following particulars, or at al-:

(a) Deny that the plaintiff or any others similarly situated, will be compelled to pay taxes pursuant to an invalid

[fol. 84] or unconstitutional enactment, or for which they are not legally liable.

(b) Deny that upon the failure of the plaintiff or others similarly situated, to pay said taxes, that any drastic penalties will be attempted to be enforced by the defendants against the plaintiff, or others similarly situated, or as a result thereof, plaintiff, or others similarly situated, will be compelled to defend innumerable actions at law brought to recover said taxes or penalties or criminal proceedings brought to impose the criminal penalties provided in Section 7, of said Act, or at a great or any expense or damage.

(c) Deny that they will expend public funds raised by taxation for the purpose of preparing to enforce or carry out the provisions of said Act to the irreparable injury or damage, or any injury or damage, of the plaintiff as a taxpayer of the Commonwealth of Kentucky.

(d) Deny that if the plaintiff, or others similarly situated, should pay said taxes under protest or be compelled to commence actions to recover the same as provided in Section 10 of said Act, they would be put to a large, or any, expense for attorneys' fees or court costs, or would be required to bring a multiplicity of actions in order to recover said moneys, or that said Act contains no provisions of any kind for the reimbursement to plaintiff, or others similarly situated, of said large sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs, or other expenses, or that plaintiff, or others similarly situated, would be required to expend said funds.

(e) Defendants deny that said Act contains no provision authorizing or permitting the plaintiff, or others similarly situated, to commence or prosecute any action at law in the courts of the United States for recovery of any tax paid [fol. 85] by it under protest, or that it plainly, or at all, attempts to prohibit any remedy, or that no waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United States as a suit against a state within the meaning of the Eleventh Amendment to the Constitution of the United States; or that in consequence whereof, or at all, the plain-

tiff, or others similarly situated, do not have a plain, adequate or complete remedy in an action at law in the courts of the United States.

Deny that the only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer or paid by him under protest, or that such is the meaning of Section 10 of said challenged Act of 1930, or from Section 162 of the Kentucky Statutes, or that these are the only statutes of the Commonwealth of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the Commonwealth of Kentucky.

Deny that by no other statute has the Commonwealth of Kentucky ever consented in any way to be sued itself or through any of its officers for the recovery of taxes illegally exacted from a taxpayer or covered into the Treasury of the State.

(f) Defendants deny that if, in the event plaintiff was successful in obtaining judgment for the recovery of such taxes under protest, the Auditor of Public Accounts did not issue his warrant upon the Treasury of the Commonwealth of Kentucky for the amount of such tax or interest as provided in said Act, the courts of the United States would have no jurisdiction of an action in mandamus to require the Auditor to issue said warrant, or that by reason thereof, [fol. 86] or at all, plaintiff does not have a plain, adequate or complete remedy at law in the courts of the United States.

(g) Defendants deny that if the plaintiff, or others similarly situated, be successful in obtaining a judgment for the recovery of any taxes under protest, that no provision is made for the payment of said judgment in money, or that the remedy of the plaintiff in such event would be limited under Section 10 of said Act, or possibly under Section 162, General Statutes of Kentucky, to the issuance of a warrant by the Auditor of Public Accounts on the Treasurer of the Commonwealth of Kentucky, for the amount of said taxes, with legal interest thereon from the date of payment, or

that said warrant by the provisions of said Act is made payable only out of the general fund of the State. Deny that said tax collected under the provisions of said Act would not go into the general fund of the Commonwealth of Kentucky. Deny that there is not sufficient funds in the general fund of the Commonwealth of Kentucky immediately, or within a reasonable time, to redeem or pay all of said state warrants heretofore or hereafter to be drawn on said fund, or that it is the practice or procedure of the Treasurer of the Commonwealth of Kentucky to redeem or pay said warrants in the order in which the same are issued or that said warrants are for this, or other reasons, not readily redeemable, saleable or bankable immediately for their face value or are subject to delay in payment. Deny that the plaintiff would be unable to obtain, full, adequate or complete relief in an action at law, or whether it would be able to obtain a return of any taxes illegally paid under said Act would depend upon the condition of said general fund at the time thereof, or upon what, if any, appropriations, the General Assembly of Kentucky would, in its discretion, be willing to make thereto or therefor.

(h) Deny that said Act is ambiguous or doubtful as to [fol. 87] its application or meaning, or as to the procedure or requirements thereunder, or that it has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(i) Defendants deny that the amount of said tax which the plaintiff would be required to pay under the terms of said Act would be in excess of $113,000, or in excess of $80,000, or that said named amount is a substantial portion of the capital invested by the plaintiff in the Commonwealth of Kentucky, or that such amount is needed by the plaintiff to carry on its business therein. Deny that the payment of such a sum of money would impair the ability of the plaintiff to operate its business in Kentucky, or will substantially decrease the amount of annual business which it will be enabled to do, or will give competitors of the plaintiff who are not required to withdraw any money from their respective businesses, or who are not required to withdraw a proportionate sum therefrom, an unfair or undue

advantage over plaintiff, for which plaintiff has no plain, adequate or complete remedy at law.

(j) Defendants deny that Section 6 of said Act which authorizes the State Tax Commission to have an attachment for the collection of the tax levied under said Act, will result in a substantial or any diminution of the value of the property employed by plaintiff, or others similarly situated, respectively in their business, or that any losses will be large in amount, or that there will be substantial losses, or any losses, or that there will be any substantial, or at all, decrease of amount of annual business done by them respectively, or that such amount, if any, cannot be measured by any damages.

(k) Defendants deny that the enforcement of said Act will have the effect of injuring or impairing all lawful business in which the plaintiff, or others similarly situated, are engaged, or in which they have the undoubted right to [fol. 88] engage, or which is guaranteed by the State or Federal Constitutions.

11. Defendants deny each and every allegation in the Bill of Complaint not herein admitted, controverted or specifically denied.

Further answering, said defendants aver and allege as follows:

1. The Act in question (House Bill 111, now Chapter 149 of the Acts of the General Assembly of 1930) levies a tax graduated progressively as to rate upon all sales of goods at retail in this Commonwealth. Retail merchants are, by the provisions of said Act, classified by amount of annual gross retail sales. The word "merchant" as defined in said Act, includes every person, firm, corporation, association, or co-partnership selling at retail in this Commonwealth, and exactly the same rate is levied upon each merchant doing a given amount of annual gross retail business without regard to whether such merchant operates one store or many stores.

2. The classification made as a basis for the tax imposed by said Act rests not only on the volume of gross retail sales, but also upon the ability of the merchants affected by

the various gradations of the Act to pay the tax imposed, it being a well recognized economic law of merchandising that the per cent of income per dollar investment increases progressively in the same or approximately the same ratio to the volume of sales as does the rate levied by said Act, that is to say, those merchants, and especially those engaged in the retail grocery business in this Commonwealth, having gross annual sales of less than $400,000 per annum, as a class, have an average annual income of —% upon their investment, and those merchants engaged in the grocery business having annual gross sales of more than $— and less than $— per year have an average annual income, as a class, of —% on their invested capital, and those retail [fol. 89] merchants engaged in the grocery business in this Commonwealth having sales of more than $1,000,000 per year, and less than $— per year, as a class, have an average annual income of —% on their invested capital, and those retail merchants engaged in the grocery business in this Commonwealth having an annual gross retail sale of $— per year, or over, have, as a class, an income of —% upon their invested capital.

Defendants further say that the example set out above is illustrative of the progressive increased ratio of earning power of invested capital to the volume of sales enjoyed by this plaintiff and others similarly situated.

3. Defendants say that the progressive increase in earning power of invested capital based on increased volume of sales as illustrated in the paragraph above, conclusively proves a proportionate increased ability to pay the tax levied by the Act in question.

4. Defendants further allege that the plaintiff, Kroger Grocery & Baking Company, and all others similarly situated are now enjoying, and have for many years enjoyed a large and prosperous retail business in this State, and that their gross annual retail sales have in many instances exceeded $12,000,000 per annum, and that they are now making, and have made, a profit of more than 3.1% on said annual sales, and that this represents a net income on capital invested in the retail business in this State of more than 17.4%, and that this plaintiff and others similarly situated, after the exaction of the tax imposed by the Act in question,

will still have a net return of more than 13% on their invested capital but this plaintiff, The Kroger Grocery & Baking Company, has due to mismanagement, internal dissention, and certain unsound merchandising practices heretofore followed by it, enjoyed a less return on its invested [fol. 90] capital than others similarly situated.

They say that the return enjoyed by the plaintiff is not, in any wise, illustrative of the return enjoyed by others engaged in like business, that is to say, other multiple outlet retail grocery organizations doing business in this State.

5. Defendants further allege that the great volume of business enjoyed by plaintiff, and others similarly situated, and the consequent progressive increase in the ratio of income from invested capital to volume of business, is brought about by the operation of natural and well recognized economic laws, as follows:

(a) It is a well established and well recognized law of merchandising economics, in so far as retail business such as conducted by plaintiff, and others similarly situated, that those merchants who enjoy a greater volume of business comparable to the volume enjoyed by plaintiff, and others similarly situated, have a much greater buying power than those enjoying a smaller volume of trade.

They say that this plaintiff, and others similarly situated, can, and do, buy goods, wares, and merchandise at a much greater discount and at a much lower price than the smaller individual merchants having a smaller volume of trade can purchase goods, wares, and merchandise of the same quality. That this plaintiff, by reason of said greater volume of trade and its great number of outlet stores, can and does contract for the entire output of many manufacturers, canners, and packers engaged in the preparation of goods, wares, and merchandise for retail trade.

They say that this plaintiff, and others similarly situated can, and do, buy their goods, wares and merchandise in car load lots and often in multiple car load lots, and they can, and do, purchase merchandise at —% less than goods, [fol. 91] wares, and merchandise of like quality can be bought or purchased by individual retail merchants having a smaller volume of trade and who are competitors of this plaintiff and others similarly situated.

(b) It is a well recognized and established rule in this Commonwealth that the ratio of turnover or volume of trade to capital invested increases progressively as volume increases.

Defendants say that this is true because plaintiff, and others similarly situated, owning many stores respectively, are enabled to, and do, deliver goods, wares and merchandise daily to practically all of their stores and are thus enabled to do a great volume of business with a minimum investment.

6. Defendants further allege that the tax imposed by the Act in question was designed, intended, and in practical operation and effect does equalize the tax burden heretofore borne by those doing a retail business in this Commonwealth, and that said equalization is brought about in part by reason of the following:

(a) Retail grocery stores now doing business in this Commonwealth, as a class, are forced by the demands of trade to sell the following articles, oleomargarine, soft drinks, and cigarettes, the privilege of selling of each of said commodities entailing the payment of license tax to the State of $10, and that without regard to the amount of volume of sales of either of said commodities; the practical operation and effect of said license tax levied on the privilege of selling the above commodities is to penalize, punish, and to place an undue burden on individual retail merchants having a small volume of business, and to favor and subsidize this plaintiff and others similarly situated.

(b) Defendants further allege that it is the law of this Commonwealth that all property subject to a state ad valorem tax is assessed as of July 1 of each year, and that the value and amount of the property owned and in this State at that time determines the amount of taxes imposed without regard [fol. 92] to the amount or value of property owned and in this State on any other day of the year.

Defendants say that this plaintiff, and others similarly situated, as a class, have heretofore, and do now, practically escape ad valorem taxation in this State by reason of the fact that they are enabled to, and do, by the very nature and operation of their business, have on hand for assessment as of July 1 of each year a minimum amount of merchandise, but that, on the other hand, individual merchants with a small volume of trade, who are endeavoring to compete with

plaintiff, and others similarly situated, or by reason of the fact that they own but one store, and for further reason that they have a lower turnover and are compelled to, in order to meet trade demands, carry a much larger stock subject to ad valorem taxation at all times, including July 1, and that thus such individual merchants are compelled to, and do, bear an undue and unjust proportion of the ad valorem taxation levied on retail merchants of this Commonwealth.

Defendants further say that this plaintiff in particular, and others similarly situated, maintain supply depots and warehouses in the State of Ohio and other adjoining states; that they can, and do, deliver to their respective stores goods, wares, and merchandise only in such amounts as are necessary to meet daily trade demands, and by reason of the fact that the State of Ohio has a different assessment date than the State of Kentucky, they can, and do, so arrange the transfer of goods, wares and merchandise so as to practically escape ad valorem taxation in both states by the simple expedient of having a great bulk of such goods, wares, and merchandise in Ohio, or some other state, on July 1, and in Kentucky on the assessment date of such other states.

(c) Defendants further allege that this plaintiff, and others similarly situated, are enabled to, and do, escape taxation altogether on money in banks of this State, by the [fol. 93] simple expedient of sending their money received from sales to another state as soon as it is received, but that this practice can not be followed by individual competing merchants.

(d) Defendants further allege that this plaintiff, and others similarly situated, who have for many years, and are now enjoying a great volume of business in this Commonwealth, have never paid, and are not now paying, their just and due proportion of the taxes levied in this Commonwealth upon retail merchants, but that said tax burden has been, and is now being borne by the small individual retail merchants in this State out of all proportion of volume of retail business enjoyed by them.

They say that those merchants enjoying the greater volume of business are not now paying more than 0.2% of the annual volume of sales for tax purposes, but that on the other hand, the small retail merchants have been, and are now, paying taxes for tax purposes at the rate of 1.3% of the gross annual sales.

7. Defendants further allege that the individual merchants in this Commonwealth, that is to say, those doing a small volume of business, owning but one store, and that store in or near the community in or where they reside, have for many years rendered to their home communities certain social services.

They say that said merchants, as citizens and residents of their respective communities, are taking and have heretofore taken, a prominent and leading part in all the charitable, religious, cultural, and social activities of their respective communities; they have, both voluntarily and in response to the pressure of public demand, given freely both of their time and money to all community activities. They say that said activities, so carried on by said merchants as a class, were worth, and are now worth, much actual money to this Commonwealth.

Defendants further say that with the coming of the multiple owned stores, such as operated by this plaintiff and [fol. 94] others similarly situated, that such individual merchants are in large part being driven from business, and that the burden heretofore borne by said individual merchants as a class, will of necessity fall upon the State, and that the State can only bear said burden by an increase in taxation.

They state that the clerks, managers, and employees who operate plaintiff's stores, can not, by the very nature of their employment, take any material part in any community activities; that plaintiff's stores are conducted with one objective; and that that objective is to take from each community in which said store is situated the greatest possible amount of money.

8. Defendants say that House Bill 111, Chapter 149 of the Acts of the General Assembly of 1930, was introduced, passed, enrolled, and signed in the manner shown by the certified copies of the entries in both House and Senate Journal relating to said bill, such certified copies are filed herewith and made a part hereof as if copied in full, marked for certification "Exhibit A".

Defendants further say that said bill was introduced, passed, enrolled, and filed in exact conformity with the Constitution and laws of the State of Kentucky.

9. For a separate and distinct defense in point of law arising upon the face of the Bill of Complaint herein, the defend-

ants say that the facts alleged in said Bill of Complaint are insufficient to constitute a valid cause of action.

Wherefore defendants pray judgment that the Bill of Complaint be dismissed and held for naught; and the prayer thereof denied; for all costs about this action expended, and for all proper relief.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard Smith Gentry, Frankfort, Kentucky, Solicitors for Defendants. Batson, Carey & Welch, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky, of Counsel.

[fols. 95 & 96] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY—Filed April 1, 1931

Comes now the plaintiff, The Kroger Grocery & Baking Company, in the above entitled cause, and for its reply to the answer filed on behalf of the defendants, states as follows:

1. Plaintiff denies that the Act in question (House Bill [fol. 97] No. 111, now Chapter 149 of the Acts of the General Assembly of 1930) levies a graduated tax upon the sale of goods at retail in the State of Kentucky, and plaintiff further denies that the same rate is levied upon each merchant doing a given amount of annual gross retail buiness without regard to whether such merchant operates one store or many stores.

2. Plaintiff denies that the classification made as a basis for the tax imposed by said Act rests upon volume of gross sales or upon ability of the merchant affected by the various gradations of the Act to pay the tax imposed; plaintiff denies that the per cent of income per dollar investment increases progressively in the same or approximately the same ratio to the volume of sales as does the rate levied by said Act, and plaintiff states that the per cent of income per dollar of investment has no relation whatsoever to the volume of sales, and plaintiff alleges that lack of relationship between per cent of income per dollar investment and vol-

ume of sales applies in the grocery business generally and to grocers operating in the Commonwealth of Kentucky as well as to other retail merchants.

3. Plaintiff denies that persons having large volume of sales necessarily have an increased ability to pay, and plaintiff alleges that the tax levied by the Act in question has no relationship to ability to pay and that said tax is levied on gross sales and bears no relation whatsoever to net income. Plaintiff further alleges that gross sales of any particular merchant has no relation to the net income of said merchant.

[fol. 98] 4. Plaintiff denies that the Kroger Grocery & Baking Company have made a profit of more than 3.1% on its annual sales in the Commonwealth of Kentucky, and plaintiff denies that it has realized a net income on capital invested in the retail business in the Commonwealth of Kentucky of 17.4%, and plaintiff denies that after the imposition of the tax imposed by the Act in question it will still have a net return of more than 13% on its invested capital, and plaintiff denies that there has been any mismanagement, internal dissension or unsound purchasing practices followed by it. Plaintiff denies that persons similarly situated will have a net return of more than 13% on their invested capital after the imposition of the tax in question, and plaintiff alleges that its return is illustrative of the return enjoyed by others engaged in a similar business, and plaintiff alleges that the per cent of profit to sales on such similar concerns does not exceed 1.5 to 2%.

5. Plaintiff denies that merchants enjoying a greater volume of business have a greater buying power than those enjoying a smaller volume of trade, and plaintiff states that many merchants with a small volume of trade have, by means of cooperative organizations, a buying power which is equal to or greater than that of the plaintiff. Plaintiff alleges that individual merchants having a volume of trade which is smaller than the retail sales of this plaintiff can purchase goods, wares and merchandise of the same quality at the same discounts as are given plaintiff and at the same [fol. 99] price that plaintiff has to pay for said goods, and plaintiff says that merchants having a smaller volume than this plaintiff, by means of voluntary purchasing combina-

tions, can and do contract for the entire output of many manufacturers, canners and packers engaged in the preparation of goods, wares and merchandise for retail trade.

Plaintiff denies that the ratio of turnover to capital invested increases progressively as volume increases and plaintiff alleges that increased sales, in many instances, are a result of an increased capital investiment and not as a result of an increased rate of turnover. Plaintiff further alleges that individual merchants, conducting a single store, and having a smaller volume of sales, have a turnover which is equal to the turnover enjoyed by this plaintiff and have a minimum investment which bears the same proportion or a smaller proportion to their sales than the ratio of plaintiff's investment to its sales, and plaintiff says that these individual merchants enjoy a per cent of profit on capital invested which is equal to or exceeds the per cent of profit to capital invested enjoyed by this plaintiff.

Plaintiff says that it makes frequent delivery of goods, wares and merchandise to all of its stores in order to enable the public to secure fresh food, meats and vegetables at said stores, and plaintiff says that said frequent deliveries entail the use of expensive distribution agencies, such as trucks, warehouses, etc., and require the employment of a great number of persons. Plaintiff says that because of the use of said expensive equipment and because of the em- [fol. 100] ployment of persons for the purpose of making frequent deliveries to its stores, it is required to expend a great deal of money, and plaintiff denies therefore, that the frequent delivery of goods, wares and merchandise to its stores enables it to do a great volume of business with a minimum investment.

6. Plaintiff denies that the tax burden heretofore borne by those doing a retail business in the Commonwealth of Kentucky was unequal and plaintiff alleges that it has at all times borne its proportionate share and paid to the Commonwealth of Kentucky and to the municipalities and subdivisions thereof all taxes which were levied on all other retail merchants at the same rate as paid by other retail merchants, and that this plaintiff has paid all other taxes at the same rate as has been paid by other individuals in the State of Kentucky. Plaintiff denies that the tax imposed by the Act in question was designed or intended to equalize the tax burden. Plaintiff states that the effect and opera-

tion of the Act in question will be to impose a burden on this plaintiff and others similarly situated and plaintiff further alleges that by reason of the low rate imposed on competitors and the deductions allowed, said competitors will only pay a negligible sum under the Gross Sales Tax Law. Plaintiff says that as a result of the discriminatory rates and deductions allowed a greater percentage of the tax burden will be placed on this plaintiff and others similarly situated, than is placed upon other retail merchants, and that this burden will be imposed without regard to ability to pay.

[fol. 101] Plaintiff admits that it pays a license tax for oleomargarine of $10., and plaintiff states that said license tax of $10. is imposed on each store operated by plaintiff, and plaintiff states that the sales of oleomargarine in each of its stores does not exceed the sales of oleomargarine by competitors who operate only a single store, and plaintiff denies that the practical operation and effect of said license tax levied on the privilege of selling the above commodity is to penalize, punish or place an undue burden on individual retail merchants who operate only a single store, and plaintiff further denies that the practical operation and effect of said license tax favors or subsidizes this plaintiff, or others similarly situated.

Plaintiff admits that it sells soft drinks and cigarettes and plaintiff states that it pays for each of the stores in which it sells soft drinks and cigarettes, a fixed license fee. Plaintiff alleges that the cigarettes and soft drinks sold in each of its stores does not exceed the cigarettes or soft drinks sold by its competitors operating a single store. Plaintiff denies therefore, that the practical operation and effect of said license taxes levied on the privilege of selling the above commodities is either to penalize, punish or place an undue burden on individual merchants operating a single store, or to favor or subsidize this plaintiff.

Plaintiff further alleges that the tax paid for the privilege of selling oleomargarine, soft drinks and cigarettes is in direct proportion to its sales of those particular [fol. 102] items. Plaintiff further says that the percentage of such tax to its sales of the particular items for which the tax is imposed, is as great as the percentage of tax paid for special licenses by individual merchants to the sales of similar articles by said individual merchants.

Plaintiff denies that this plaintiff or others similarly

situated, have heretofore and do now practically escape ad valorem taxes in the State of Kentucky, and plaintiffs deny that on July 1st, of each year they have on hand for assessment a minimum amount of merchandise. Plaintiff says that on July 1st, the plaintiff has on hand merchandise which is equal in value to merchandise on hand any other day during the year, and plaintiffs deny that individual merchants are compelled to and do bear an undue and unjust proportion of the ad valorem taxes levied on retail merchants of the Commonwealth of Kentucky.

Plaintiff denies that persons operating a single store have a lower turnover than this plaintiff, and plaintiff denies therefore, that said individual merchants are compelled to and do bear an unjust and undue proportion of the ad valorem taxes levied on retail merchants in the State of Kentucky.

Plaintiff denies it transfers goods, wares and merchandise from the State of Kentucky so as to escape ad valorem taxation, and plaintiff further denies that goods are moved out of this state or out of any other state for the purpose of evading the assessment of personal property or any other tax. Plaintiff alleges that a stock of goods, wares and merchandise in each store is maintained in relation to [fol. 103] the needs of the store and the demands of customers, and plaintiff states that the needs of each particular store and demands of customers purchasing goods at Kentucky stores are no different on July 1st, than on any other date, and plaintiff states that the goods, wares and merchandise in stores in the State of Kentucky on the first day of July, 1930, are equal to the supply of goods, wares and merchandise at any other time.

Plaintiff denies that it evades taxation on money in banks in the State of Kentucky by sending its money to any other state, and plaintiff states that individual merchants operating only one store have the same rights and same opportunities of depositing their money where they desire, as are enjoyed by this plaintiff.

Plaintiff denies that merchants enjoying a greater volume of business in the Commonwealth of Kentucky have never paid and are not now paying their just and due proportion of the taxes levied in the Commonwealth of Kentucky upon retail merchants, and plaintiff denies that merchants having a greater volume of business are not paying

more than .2% of the annual volume of sales for tax purposes, and plaintiff further denies that small retail merchants are paying as high as 1.3% of the gross annual sales for tax purposes. Plaintiff states that the ad valorem taxes of the State of Kentucky are based on the value of the property and that this plaintiff and others similarly situated pay at the same rate on the value of their property as do individual merchants having a smaller volume of sales.

[fol. 104] Plaintiff denies that individual merchants in the Commonwealth of Kentucky doing a small volume of business and owning but one store render any special service to the community by reason of the fact that they operate a retail store.

Plaintiff further denies that the operation of its business or the operation of similar businesses has caused individual merchants to be driven from business, and plaintiff denies that there has been any special burden carried by said individual merchants, and plaintiff further denies that any special burden falls upon the state by reason of the operation of plaintiff's business.

Plaintiff further denies that the purpose of the Kentucky Gross Sales Tax Law was to prevent individual merchants from being put out of business, but plaintiff says that the purpose of said tax law was to subsidize individual merchants operating a single store at the expense of this plaintiff, although said subsidized merchants conduct a business which is similar to that of plaintiff, and compete directly with this plaintiff.

Plaintiff denies that the clerks, managers and employees who operate plaintiff's stores cannot, by the nature of their employment, take any material part in the community activities, but plaintiff states that these employees do take part in community activities, and plaintiff further alleges that it encourages its employees to take an interest in the life of the community in which they reside. Plaintiff denies that its stores are conducted with the objective of taking from each community in which said store is situated, the [fol. 105] greatest possible amount of money. Plaintiff states that it endeavors to sell food of the highest quality at the lowest possible price and that as a result of the saving which customers enjoy, because of the small margin of

profit, that the communities in which plaintiff's stores are situated have retained a great amount of money which would be lost to said communities if consumers purchased their food products at the establishments conducted by persons who did not attempt to sell merchandise of the quality sold by plaintiff at prices equal to prices charged by this plaintiff.

7. Plaintiff denies that House Bill No. 111, Chapter 149 of the Acts of the General Assembly of 1930, was introduced, passed, enrolled and filed in exact conformity with the Constitution and Laws of the State of Kentucky, and plaintiff states that said Act was introduced, read, passed, enrolled and signed under the title: "H. B. 111, An Act to Restrain the Unfair Competition of Chain Stores and in Aid of Individual Merchants of the Commonwealth."

Wherefore plaintiff prays that the above entitled Act be held unconstitutional and that the defendants be enjoined in the manner prayed for in its Bill of Complaint, and for its costs herein expended, and for all other proper relief.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.

[fol. 106] *Duly sworn to by C. M. Robertson. Jurat omitted in printing.*

[fol. 107] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF SUBMISSION—Filed Feb. 14, 1931

This day this cause coming on for hearing before the Hon. Chas. H. Moorman, Circuit Judge, Hon. A. M. J. Cochran, District Judge, and Hon. Chas. I. Dawson, District Judge, on motion of plaintiff for an interlocutory injunction. The plaintiff introduced the deposition of Shirley Haas filed 2/6/31. The plaintiff, by counsel, filed the affidavits of the following persons, viz:

Robert W. Lyons,	C. R. Leininger,
D. T. Petty,	W. H. Howell,
Albert C. Huneke,	A. C. Miller,
Rufus Blume,	W. G. Jenkins,
John E. Donahue,	T. B. Jones,

Louie C. Jones,
M. R. Anderson,
R. W. Owens,
Fred Levy
N. A. Bash,
B. E. Van Antwerp,
M. S. Gesley,
W. T. Morgan,
H. M. Craven,
C. W. Gowin,
J. A. Gude,
L. M. Ross,
Milton Marx,
Ernest Thompson,
John B. Bonham,
Gilbert J. Schneider,
Walter Wenderoth,
O. W. Vaughn,
John Scanlan,
Brack E. Ferrill,
C. J. Henry,
Crawford Lee,
Dan Byck,
G. H. Parker,
B. E. Willis,
B. A. Aistrop,
Dolph Wile,
Daniel M. Cohen,
W. A. Steinden,
Albert B. Berger,
Francis Ballard,
John C. Schwarz,
Chris Schumann,
Arch B. Davis,
Harman Noe,
Robert J. McKim,
C. B. Turley,
John R. Karibo,
E. R. Probasco,
E. C. Purvis,
O. A. Rhodes,
Robert Wright,
P. O. Wolverson,
J. D. Delano,
H. C. Amstutz,
C. H. Parsons,
James W. Stites,

and a synopsis and analysis of reports concerning the Gross Sales Tax signed by Joseph Martin, Supervisor of the Gross Sales Tax Department, and A. H. Brendel, Certified Public [fol. 108] Accountant. The Court heard argument of counsel for the plaintiff.

Came the defendants, by counsel, and filed motion to dismiss, and not waiving same, motion to strike out certain parts of the Bill of Complaint, and not waiving same, answer. Came also the defendants, by counsel, and filed the affidavits of Henry F. Walradt, together with Exhibits A, B, C, D, E, F, G, H, I, and J; the affidavit of James W. Martin, together with Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16; the affidavit of Clyde W. Phelps; the affidavit of B. T. Brewer; and a certified copy of the House and Senate Journal relating to the introduction, passage, approval, and enrollment of House Bill # 111 of the 1930 Session; and a certified copy of the Gross Retail Sales Tax Law; the deposition of Walter Burr and a paper dated

Feb. 13, 1931, in regard to retail gross sales tax reports audited.

Plaintiffs were granted leave to file replies to defendants' answers.

The Court heard argument of counsel for the defendants, and not being fully advised of the judgment it is proper to render herein, takes time, and this case is submitted with leave to plaintiff to February 28, 1931, within which to file brief, and defendants to March 10, 1931, within which to file their brief.

And it is further ordered and adjudged that the temporary restraining Order heretofore entered herein on the 29th day of January, 1931, be and the same is hereby continued in full force and effect until the determination of said application for an interlocutory injunction.

February 14, 1931.

Chas. H. Moran, Judge. A. M. J. Cochran, Judge.
Chas. I. Dawson, Judge.

Approved Feby. 23d, 1931.
J. W. Cammack, S. H. Brown, Asst. Atty. Gen.

[fol. 109] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER LISTING PARTIES PROTECTED BY RESTRAINING ORDER—
Filed March 28, 1931

This day came the parties herein and by agreement it is ordered as follows:

I

Counsel for plaintiffs listed of record the following retail merchants represented by them and included within the same class of taxpayers as plaintiffs in the above-styled four suits, or one of them, namely:

J. C. Penny Co.
Kaufman-Straus Co., Inc.;
H. P. Selman & Co.,
Louis Appel Co.,
Montgomery Ward Co.,

Lord's,
Lemon & Son,
Wm. Kendrick's Sons,
S. S. Kress & Co.,
Kroger Groc. & Baking Co.,
Shenley's, Inc.;
Herman Straus & Sons, Inc.;
J. Bacon & Sons,
Rodes-Rapier Co.,
Geiger & Ament,
Melville Shoe Corp.,
Hubbuch Bros. & Wellendorff,
Husch Bros.,
Bensinger Outfitting Co.,
Western Auto Supply,
Byck Bros. & Co.,
Mangel's, Inc.;
[fol. 110] Levy Brothers,
W. T. Grant Co.,
Great A. & P. Tea Co.,
S. S. Kresge Co.,
Durant-Perry Co., Inc.
John C. Lewis Co., Inc.,
The Stewart Dry Goods Co.,
Denhard Company, Inc.,
Central Furniture,
F. W. Grant Silver,
G. R. Kinney Co.,
National Bellas Hess Co.,
Stearns Coal & Lumber Co.,
The Sutcliffe Co.,
Consolidated Auto Supply,
F. W. Woolworth Co.,
S. S. Specialty Shop,
Besten & Langen,
D. H. Ewing's Sons,
W. K. Stewart Co.,
Wilson Bros.,
S. M. Goldberg Operating Co.,
Walgreen Co.,
Hook Drug Co.,
Sears & Roebuck,
Louis K. Liggett Co.

By consent of parties, plaintiffs and defendants, it is now ordered that the protection afforded by the restraining orders issued in these cases shall be restricted to the various retail merchants listed in this order, and shall not extend to any other retail merchants in the State of Kentucky unless such other retail merchant or merchants shall be hereafter included in said list by supplemental order herein made, upon such terms as may be agreed upon by the parties or ordered by the Court.

II

By further agreement of the parties, it is hereby ordered that, in addition to the $5,000.00 bond heretofore given by the plaintiffs in each of the above-styled cases, the plaintiffs in each of said cases shall give a further bond, with good security to be approved by the Court or the District Judge presiding therein, in the penal sum of $10,000.00, conditioned upon the payment of such costs and damages as may be incurred or suffered by the defendants, or any of them, who may be found to have been wrongfully enjoined or restrained thereby. Such bond shall be filed within 10 days from this date, and in default of such filing, the statutory Court may make such orders as it may deem proper with reference to the continuance in force of the restraining orders issued in the above cases.

The object of this agreed order is to furnish a bond of $15,000.00 in each of the above-styled cases as a condition [fols. 111 - 115] of said restraining order.

Chas. H. Moorman, A. M. J. Cochran, W. M. Dawson, Judges.

March 28, 1931.

Agreed to.

Robert S. Marx, John C. Doolan, Solicitors for Plaintiffs. S. H. Brown, Solicitor for Defendants.

[fol. 116] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

KROGER GROCERY & BAKING COMPANY, Plaintiffs,

vs.

JOHN B. LEWIS, SELDEN GLENN, and HENRY M. CLINE, as Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants.

Before Moorman, Circuit Judge, and Cochran and Dawson, District Judges

OPINION—Filed Nov. 6, 1931

In this action plaintiff, an Ohio corporation, owning and operating a chain of retail grocery stores in the United States, two hundred and sixty-three of which are located in different parts of the Commonwealth of Kentucky, attacks Chapter 149 of the 1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the Retail Merchant's Gross Sales Tax Act, as violative of the Federal and State Constitutions. The case is now before us on application of the plaintiff for an interlocutory injunction, under Section 266 of the Judicial Code (28 U. S. C. A., Section 380).

At the threshold of the case we are met with the contention of the defendants that a Federal court of equity is without power to grant the relief sought, for the reason that the law of Kentucky affords plaintiff an adequate remedy at law for any injury sustained by it resulting from its enforced compliance with the terms of the Act. A decision of this question involves a construction of Section 10 of the Act, which reads as follows:

[fol. 117] "No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax and when due, and if paid under protest may at any time within two years from the date of such payments sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon

from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

If this section of the Act affords to the aggrieved taxpayer a remedy as certain, complete, practicable and efficient as is available in equity, and if the remedy thus afforded is available in the Federal Courts, other jurisdictional requirements appearing, then this action must be dismissed. The declared purpose of Section 10 is to prevent injunctive interference with the operation of the law. It is quite apparent from a reading of this section that its draftsman was familiar with the rule, that in order to make effective the prohibition against injunctive interference, the statute must furnish an adequate remedy at law in lieu thereof. The effort in Section 10 is to afford such adequate remedy at law, and, in view of the well settled rule that such a remedy must be available in the Federal Courts, if the necessary jurisdictional facts exist, it will not be presumed that the legal remedy provided was intended to be confined to the State courts, unless the language of the Act requires such construction. On the contrary, the statute will be construed to render effective the evident legislature intent, if such construction is not inconsistent with the plain language of the Act. Of course, the common law action authorized by Section 10 against the Auditor of Public Accounts is, in reality, an action against the state. The section does not contemplate that the Auditor shall personally satisfy any judg- [fol. 118] ment obtained under its provisions. By its express terms the ultimate liability is that of this State, and the Auditor is simply designated as a convenient alter ego of the State in suits for the recovery of taxes and interest claimed to have been illegally collected under the Act in question. Highway Commission of Wyoming v. Utah Construction Co., 278 U. S. 194. So we must regard Section 10

as the standing consent of the State, subject to the conditions therein imposed, to be sued for the recovery of taxes exacted under the provisions of the Act in question. Of course, when a sovereign consents to be sued, it may fix the conditions under which such suit may be maintained. It may even name the court in which such suit may be maintained, and the State's consent to be sued in a Federal Court. Chandler v. Dix, 194 U. S. 590; Murray v. Wilson Distilling Co., 213 U. S. 151.

We are unable, however, to agree with the suggestion of the plaintiff that Section 10 limits the common law action therein provided for to State courts. The section contains no language, expressly or by implication, so limiting the cause of action. The language is certainly broad enough to authorize actions in the Federal courts, and having in mind the evident purpose of the General Assembly to provide an adequate remedy at law for all taxpayers under the act, we conclude that the legal remedy provided by Section 10 was intended to be available in the Federal courts, as well as in the State courts. Such being the case, Section 10 operates as a waiver the immunity against suits in Federal courts granted to States by the Eleventh Amendment to the Federal Constitution.

The plaintiff contends that even conceding that it is the purpose of Section 10 to make the legal remedy provided by that section available in the Federal courts, such purpose is aborted by reason of the fact that the suit at law authorized by that section is a mandamus proceeding, of which United States District Courts have no original jurisdiction. If the premise thus advanced is sound, the conclusion necessarily follows, as it is well settled that Federal [fol. 119] courts are without jurisdiction to issue a writ of mandamus in an original action brought for the sole purpose of securing relief by such writ. Marbury v. Madison, 1 Cranch, 137; Covington Bridge Co. v. Hager, 203 U. S. 109; Knapp v. Lake Shore & Michigan Southern Ry Co., 197 U. S. 536. But we can not agree with the premise. The common law suit authorized by Section 10 is not an original mandamus proceeding. It is an ordinary common law action against the Auditor of Public Accounts in his official capacity as the agent and representative of the State for a money judgment for the amount of taxes paid under the

Act under protest, and interest thereon. The suit has none of the characteristics of an original mandamus proceeding. If, after judgment is obtained, the Auditor then in office declines to issue a warrant for the amount of such judgment and interest, the Federal Court which rendered the judgment could issue a mandamus to compel the issual of such a warrant. Such a writ, however, would not be one issued in an original mandamus proceeding, but would be one issued in aid of the Court's jurisdiction which had already attached in the common law action for a money judgment. The issual of the writ in such a situation is authorized by Section 262 of the Judicial Code (Title 28, Section 377, U. S. C. A.) and is fully justified by the authorities. County of Green v. Daniel, 102 U. S. 187; Davenport v. County of Dodge, 105 U. S. 237.

We do not agree with the suggestion of the plaintiff that the settled and approved practice under Section 162 of Kentucky Statutes fixes the nature of the proceeding under Section 10 of the Act in question. Section 162 is, in part, as follows:

"When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the Treasurer for such money so improperly paid in behalf of the person who paid the same."

This section makes no provision whatever for a common law action against the Auditor for a money judgment. It simply lays upon the Auditor the duty in a proper case of issuing his warrant for the taxes illegally or improperly collected. If he fails in the performance of this statutory [fol. 120] duty, then mandamus in the State court is the only remedy against him, and in such proceeding the court must determine if he wrongfully refused to issue warrant for the amount claimed. Under Section 10 of the Act under consideration, however, the statutory duty of the Auditor to issue his warrant never arises until the amount for which the warrant is to be issued has been fixed by a money judgment in a common law suit. The difference between the two provisions of the statute is obvious. Furthermore, if the remedy under Section 10 is the same remedy granted by Section 162 of Kentucky Statutes, there would have

been no occasion for the incorporation of Section 10 in the Act under consideration. We must and do regard Section 10 as a specific remedy at law, intended to apply only to the recovery of taxes exacted under the Gross Sales Tax Act.

The plaintiff suggests that conceding that Section 10 gives a right of action in Federal Courts, still the remedy at law is not adequate, for the reason that the General Fund of the State, out of which Section 10 directs the warrants to be paid, is not in such condition as to enable these warrants to be paid within a reasonable time after they are issued. In support of this argument plaintiff has introduced proof, showing that there are now outstanding nearly ten million dollars of warrants against the General Fund, and that this fund is usually over two years behind in the redemption of warrants drawn against it. It may be conceded that if taxpayers obtaining judgments under Section 10 were compelled to wait an unreasonable length of time for their money, the remedy at law given by this section would not be adequate; but no such unreasonable delay is indicated. The fair and reasonable maneing of that part of Section 10 which provides for the payment of warrants issued in satisfaction of judgments obtained under that section is that such warrants shall be paid when presented, if there is sufficient money in the General Fund to do so, even though there may be outstanding other and prior warrants against this fund. The general law of Kentucky contains no express direction to the Treasurer [fol. 121] to pay warrants drawn on the treasury in the order of their issue, although such is probably the fair inference to be drawn from language used in Section 4688a-4, Kentucky Statutes, Carroll's 1930 Edition, and the Court of Appeals in the case of Rhea v. Newman, 153 Ky. 604, held that the Treasurer should pay them in the order issued, for the purpose of insuring fair treatment to all. Bearing in mind, however, that the purpose of Section 10 is to afford the taxpayers entitled to its provisions a full and complete remedy at law, and that this remedy would not be full and complete unless the holders of judgments obtained under its provisions could secure the reasonably prompt payment thereof, it seems entirely consistent to hold that it was the purpose of the General Assembly to give warrants issued in satisfaction of judg-

ments obtained under Section 10 priority of payment over other outstanding warrants against the General Fund, and to that extent to make an exception to the general rule as to the order of payment of State warrants. Such a construction of the section does no violence to its language and works no impairment of any contract obligation of the State to holders of prior warrants, as such outstanding warrants do not pledge the State to redeem them at any particular time. Even if we should be mistaken in this construction of Section 10, and if warrants issued under its provisions enjoy no priority of payment, we would not be justified in holding that taxpayers recovering judgments under Section 10 would be required to wait an unreasonable length of time to realize on such judgments.

Under the general law of Kentucky, when a warrant against the General Fund is presented for payment, and the fund is not sufficient to satisfy same, the Treasurer must stamp same as interest bearing, and it thereafter draws interest at the rate of five per cent per annum, payable semi-annually, until called for redemption. (Section 4688a-2, Kentucky Statutes, Carroll's 1930 Edition.) Such [fol. 122] warrants by the law of Kentucky are made negotiable instruments and are exempt from State and local taxation. (Section 4688a-8, Kentucky Statutes, Carroll's 1930 Edition.) It appears that these warrants are readily salable, and the record fails to disclose that any concession in the way of discount must be made to effect their sale. It will be observed that Section 10 not only provides for the recovery of the taxes paid, but for interest thereon as well. So far as we are advised, the Supreme Court has never held that the recovery of interest on taxes paid is necessary in order to make the remedy at law adequate. On the contrary, it is fairly deducible from the cases that the remedy at law is adequate, even though no recovery of interest is allowed in the cases of Shelton v. Platt, 139 U. S. 591, and Allen v. Pullman Palace Car Co., 139 U. S. 658, the Supreme Court held that a law of Tennessee which permitted a taxpayer to recover from the State taxes paid under protest if they were wrongfully collected, but which made no provision for the recovery of interest, afforded an adequate remedy at law. Inasmuch as it is a settled principle of law that interest can not be collected from

a sovereign State unless its recovery is specifically authorized by a State statute, we can not presume that the Supreme Court in the cases referred to went on the assumption that interest as a matter of right followed the judgment. So we think it may be safely said that in permitting the recovery of interest under Section 10, the Commonwealth has bound itself to return more than was necessary in order to meet the test of an adequate remedy at law. Therefore, even if it appeared as a fact that some discount must be accepted by those who sell warrants issued under Section 10, it is probably that such discount would not exceed the interest which had accumulated on the tax from the date of its payment to the date of the rendition of the judgment. Furthermore, the State of Kentucky has no bonded indebtedness and is entirely solvent. Subject to the requirement of uniformity, the power of the General [fol. 123] Assembly to tax for public purposes of the State is unlimited, and with this unlimited power residing in the General Assembly, this court will not assume that under Section 10 an aggrieved taxpayer can not recover within a reasonable time the full amount of the taxes paid.

Neither are we impressed with the contention of the plaintiff that Section 10 does not afford an adequate remedy at law, because under it a taxpayer would be compelled to resort to a multiplicity of suits to recover the various payments made under the Act. There is no necessity for a multiplicity of suits under Section 10. That section specifically provides that—

"A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as ma-y payments as may have been made, and which are not barred by the limitation of two years herein, imposed."

This is the law even though such a provision had not been incorporated in Section 10. Therefore, the plaintiff may united in one suit its claims growing out of each payment of taxes made under the Act up to the time of filing its suit, and that action would fully determine every question which could be determined in an equitable action. There would be no necessity for other suits, except possibly to

avoid the running of the statute of limitations pending the final determination of the suit already filed. A court of equity will not interfere on the ground of multiplicity of suits, where such multiplicity consists of suits by the same plaintiff against the same defendant for causes of action arising out of the same facts and legal princi-les. A multiplicity of suits in such a situation would be a multiplicity of the plaintiff's own making, and would afford no ground for equitable intervention. Boise Artesian Water Co. v. Boise City, 213 U. S. 276; Standard Oil Co. v. Atlantic Coast Line Co., 13 Fed. (2d) 653. We will not assume that after the validity of the tax has been once definitely settled in an action at law, the State will make any attempt to enforce further collections.

[fol. 124] Finally, the fact that the Act imposes drastic penalties for failure to comply with its terms, and pay the tax when due, affords no basis for equitable intervention. The Act visits these penalties upon the taxpayer only in event of failure to comply with its terms and pay the tax. To test the validity of this Act in an action at law, it is not necessary for the plaintiff to refuse to pay the tax and take the hazard of the cou-ts deciding against him when the State undertakes in a legal action to enforce the penalties. All the taxpayer is required to do is to pay the tax, and when he has done this, he not only avoids the imposition of penalties, but has open to him a simple and direct way in a common law suit of attacking the validity of the law and of recovering the taxes paid, with interest thereon.

We, therefore, conclude that the remedy afforded by Section 10 of the Act is an adequate one within the Federal rule, and the motion to dismiss for want of equitable jurisdiction must be sustained.

November 6, 1931.

Chas. H. Moorman, U. S. Circuit Judge. A. M. J. Cochran, U. S. District Judge. Chas. I. Dawson, U. S. District Judge.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, O.; Trabue, Doolan, Helm & Helm, Louisville, Ky., Attorneys for Plaintiff.

J. W. Cammack, Attorney General, Frankfort, Ky.; S. H. Brown, Asst. Attorney General, Frankfort, Ky.; H. S. Gentry, Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky., Attorneys for Defendants.

[fol. 125] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

In Equity. No. 3908

THE KROGER GROCERY & BAKING COMPANY, Complainant,

vs.

JOHN B. LEWIS et al., Defendants

ORDER AND DECREE—Filed Dec. 10, 1931

This cause having been heard by consent of parties, together with the causes of The Stewart Dry Goods Company against the same defendants, Fred Levy et al. against the same defendants, and The J. C. Penney Company against the same defendants, pending in the United States District Court for the Western District of Kentucky, and having been submitted with them on February 14, 1931, upon plaintiff's motion for an interlocutory injunction heard by the court upon the depositions, affidavits and exhibits referred to in the order of submission as having been introduced by plaintiffs and defendants respectively, this Court, being advised, on November 6, 1931, delivered its written opinion entitled in the cause of The Kruger Grocery and Baking Company against John B. Lewis et al., a copy of which opinion is now filed in this cause as a part of the record herein, and pursuant thereto, and solely for the reasons stated in said opinion, plaintiff's said motion for an interlocutory injunction herein is hereby denied, to which the plaintiff excepts.

It is further ordered by the Court that this cause be and it is hereby submitted upon motion of the defendants to dismiss the bill, and the Court, being of opinion that there is a plain, adequate and complete remedy at law afforded to [fol. 126] the plaintiff for the reasons set forth in its said opinion, declines to consider any issue or question raised herein except the single question as to the adequacy of the remedy at law, and, solely for the reasons stated in its said opinion, sustains the motion of defendants to dismiss the bill, and denies to the plaintiff a permanent injunction or any injunctive relief prayed by it.

It is therefore adjudged and decreed that the plaintiff's bill herein be dismissed, and that the defendants recover of the plaintiff their costs herein expended; to all of which the plaintiff excepts.

The plaintiff having this day stated in Court its intention to appeal from this Order and Decree, denying plaintiff's motion for an interlocutory injunction, and denying its application for a permanent injunction, and dismissing its bill of complaint, it is hereby further ordered and adjudged that the Temporary Restraining Order heretofore issued in this cause shall be continued in effect as to the plaintiff, and as to each retail merchant listed of record (by Order entered March 30, 1931, and supplemented as to Ben Snyder, Incorporated, by later order) as included in the same class of taxpayers as plaintiff, and shall remain in full force and effect as to the plaintiff and each of said taxpayers so listed until the final determination of plaintiff's said appeal, to all of which defendants except and object; Provided, However, that the plaintiff, for itself only, and each of said taxpayers so listed desiring to avail himself or itself of the benefit of said restraining order pending such appeal, for himself or itself only (and not one for another), shall within thirty (30) days from the entry of this Decree execute such bond or make such deposit of money or securities as required herein and as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of [fols. 127-141] any taxes, interest, court costs, and all other proper charges that may be or become due from such taxpayer, under the Act assailed herein by plaintiff, in the event the validity of such Act should be finally established.

The amount of any such bond given and the amount or value of securities or money deposited by any taxpayer, shall be fixed at an amount equal to the estimated taxes claimed from said taxpayer for the taxable period of 1930 and 1931, and said bond shall be secured by corporate surety or the pledge and deposit of negotiable securities acceptable to the Attorney General of Kentucky.

In the event the plaintiff or any one of said taxpayers shall fail to execute such bond or give such security as required of it or him or them, within thirty (30) days from the entry of this Order and Decree, said restraining order as to such taxpayer so failing shall be thereupon immediately dissolved and shall afford no further protection to such taxpayer.

Upon the execution by the plaintiff herein of a bond secured as herein provided, the bond or bonds heretofore executed by the plaintiff in this cause shall be cancelled as to all future liability, and the like order is made as to the

bond heretofore executed herein by Ben Snyder, Inc., upon its compliance, within thirty (30) days, with the provisions of this Order by the execution of a new bond or the deposit of securities as herein required.

Chas. H. Moorman, Circuit Judge. Chas. I. Dawson, District Judge. A. M. J. Cochran, District Judge.

Have seen.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff. Burke & Lawton, Solicitors for Ben Snyder, Incorporated. J. W. Cammack, S. H. Brown, Leslie W. Morris, Batson, Cary & Welch, Solicitors for Defendants.

[fol. 142] In United States District Court

[Title omitted]

Order Substituting Party Defendant—Filed March 1, 1932

This day came the parties herein and filed a stipulation noting that the term of office of the defendant, Clell Coleman, has expired within six months of the date hereof, and the said defendant has retired from said office and was thereupon succeeded therein by J. Dan Talbot.

And it appearing to the Court that there is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved,

It is ordered that J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky, be and he is hereby substituted as a defendant herein in lieu of the defendant, Clell Coleman, and with the same effect as if he had been an original defendant to the bill of complaint herein, and said cause is continued and maintained against the said J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

Have seen.

S. H. Brown.

[fol. 143] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed March 1, 1932.

The plaintiff, The Kroger Grocery & Baking Company, conceiving itself aggrieved by the order and decree entered herein by this Court on the 9th day of December, 1931, in the above-entitled cause, insofar as said order and decree denies the motion of this plaintiff, after notice and hearing, for an interlocutory injunction restraining the defendants as prayed in the motion of plaintiff for such interlocutory injunction, hereby appeals to the Supreme Court of the United States from said order and decree denying its motion for an interlocutory injunction as prayed therein.

The plaintiff, further conceiving itself aggrieved by the said order and decree entered herein on the 9th day of December, 1931, insofar as said order and decree sustains the motion of the defendants herein to dismiss this plaintiff's bill of complaint and directs the dismissal of said bill of complaint and denies to this plaintiff a permanent injunction or any injunctive or other relief prayed by it and adjudges that plaintiff's said bill of complaint be dismissed and that the defendants recover of plaintiff their costs in [fol. 144] this cause expended, hereby appeals to the Supreme Court of the United States from said order and decree insofar as it sustains the motion of said defendants to dismiss the bill of complaint herein and denies to this plaintiff a permanent injunction, or any injunctive or other relief prayed by it, and decrees that its said bill of complaint be dismissed and that the defendants recover of this plaintiff their costs in this cause expended.

The appeals herein prayed are taken upon the grounds and for the reasons specified in the assignments of errors filed herewith pertaining to the respective portions therein designated of said order and decree herein appealed from.

Plaintiff prays that its said appeals be allowed, and that a citation be issued thereon, directed to the above-named defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts

of the Commonwealth of Kentucky, commanding them and each of them to appear before the Supreme Court of the United States, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said order and decree was entered be duly authenticated and sent to the Supreme Court of the United States.

The Kroger Grocery & Baking Company, by Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors.

Copy recd.

S. H. Brown, Asst. Atty. Gen.

[fol. 145] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 1, 1932

The plaintiff, by counsel, respectfully represents that in the records and proceedings had in the above-entitled cause and in the rendition of the interlocutory decree herein appealed from, and also in the rendition of the final decree herein appealed from, there is manifest error, for which each of said decrees herein rendered should be reversed, and as cause for such reversal the plaintiff makes the following assignments of errors:

I

Assignments of Errors Committed by the Court, Both

(A) In the rendition of its interlocutory decree, denying plaintiff's motion for an interlocutory injunction, and

(B) In the rendition of its final decree sustaining motion of defendants to dismiss the bill and thereupon dismissing plaintiff's bill of complaint.

(1) The Court erred in holding that Section 10 of the Act of the General Assembly of Kentucky, being Chapter 149 of the Session Acts of 1930, which is assailed in the bill [fol. 146] as unconstitutional and hereinafter, for brevity,

referred to as the challenged Act, affords to the plaintiff a remedy at law that is plain or adequate or complete, within the meaning of Section 384, Title 28, United States Code.

(2) The Court erred in holding that any remedy at law afforded to plaintiff by any provision of Kentucky law is plain or adequate or complete, or as practical and efficient to the ends of justice and its prompt administration as the remedy in equity herein sought by plaintiff.

(3) The Court erred in holding that any remedy at law afforded by any section of the challenged Act, or by any other provision of Kentucky law, is a remedy at law available to plaintiff in any Federal Court.

(4) The Court erred in holding that Section 10 of the challenged Act authorizes any action at law against the Commonwealth of Kentucky.

(5) The Court erred in holding that by Section 10 of the challenged Act, the Commonwealth of Kentucky has consented to be sued or has submitted itself to a suit at common law for the recovery of a money judgment for the amount of any illegal tax exacted of plaintiff, or for any part thereof, or for any interest thereon.

(6) The Court erred in holding that the Commonwealth of Kentucky, by Section 10 of the challenged Act, or by any other provision of Kentucky law, has waived its immunity under the Eleventh Amendment to the Constitution of the United States from suit against itself or against its [fol. 147] Auditor of Public Accounts as its representative, that might be brought by plaintiff in any court of the United States.

(7) The Court erred in holding that the Commonwealth of Kentucky, by Section 10 of the challenged Act, has consented that it, or its Auditor of Public Accounts, as its representative, might be sued at law in any court of the United States in an action by plaintiff for the recovery of illegal taxes exacted of it under the Act assailed in this case, or has consented that any judgment for the recovery of such illegal taxes, or any part thereof, or any interest thereon, might be recovered in any action in any court of the United States, or in any other court except a court of competent

jurisdiction organized and established under the Constitution and laws of Kentucky.

(8) The Court erred in holding that under Section 10 of the challenged Act, a money judgment may be rendered in any court, either of the United States or of Kentucky, against the Commonwealth of Kentucky or its Auditor of Public Accounts as its representative, for the recovery of such taxes, or any portion thereof.

(9) The Court erred in holding that the remedy at law afforded by Section 10 of the challenged Act, or by any other provision of Kentucky law, is in substance or effect any remedy other than a remedy by way of mandamus compelling the Auditor of Public Accounts to draw his warrant upon the Treasurer of the Commonwealth of Kentucky for the amount of any tax found to be illegal, exacted of plaintiff under said Act, together with interest thereon, which warrant is restricted by said Act to payment out of the General Fund of the Commonwealth.

[fol. 148] (10) The Court erred in holding that under the facts set forth in the bill (and shown by the evidence) no unreasonable delay would be encountered by plaintiff in obtaining a refund or a recovery of illegal taxes exacted of plaintiff under the challenged Act, or any portion thereof, or any interest thereon, through any proceedings authorized under said Act, or any other provision of Kentucky law.

(11) The Court erred in holding that Section 10 of the challenged Act provides in effect for the payment when presented, or within a reasonable time thereafter, of any warrant that might be issued in satisfaction of any judgment that might be obtained by plaintiff in any action at law authorized under said Act or any other Kentucky law.

(12) The Court erred in holding that any such warrant, if or when obtained in any action at law authorized under Section 10 of the challenged Act, or by any other provision of Kentucky law, must be paid when presented if there is sufficient money in the General Fund to pay it, in preference to other outstanding warrants previously issued against said General Fund.

(13) The Court erred in holding that Section 10 of the challenged Act makes an exception to the general rule of

law prescribed in Section 4688a-4, Kentucky Statutes (Carroll's 1930 Edition), as construed by the Court of Appeals of Kentucky in Rhea, Treasurer, v. Newman, 153 Ky. 604-618, to the effect that it is the duty of the Treasurer of the Commonwealth to pay warrants against the General Fund in the order in which they are issued, and further erred in holding that Section 10 of said Act affords to any warrants issued pursuant thereto priority of payment over other outstanding warrants against the General Fund.

[fol. 149] (14) The Court erred in holding that any provision of the general law of Kentucky authorizing the Treasurer to stamp warrants against the General Fund presented to him for payment, as interest-bearing, and thereafter allowing interest thereon at the rate of five per cent per annum, payable semi-annually, until called for redemption, affords to plaintiff any remedy that is plain or adequate or complete, or as practical and efficient to the ends of justice and to the prompt administration thereof, as the remedy in equity herein sought by plaintiff.

(15) The Court erred in holding that the mere recovery of interest at five per cent per annum, payable semi-annually, on a judgment for the recovery of taxes illegally exacted, when the current legal rate of interest in Kentucky is six per cent per annum, is sufficient to make the remedy at law as plain or adequate or complete, or as practical and efficient to the ends of justice and the prompt administration thereof, as the remedy in equity herein sought by plaintiffs.

(16) The Court erred in holding that such remedy at law as is afforded by Section 10 of the challenged Act is, or that it would be, adequate or complete, even though no interest be therein allowed to plaintiff on taxes illegally exacted of it under the challenged Act.

(17) The Court erred in holding that plaintiff, upon obtaining judgment in any action at law authorized by Section 10 of the challenged Act, or by any other provision of Kentucky law, and upon obtaining warrants issued to it pursuant to any such judgment, can legally or equitably be required, upon the nonpayment of such warrants when presented, to hawk them about, in an effort to find a purchaser thereof, or to bargain with any such purchaser upon terms of sale to him.

[fol. 150] (18) The Court erred in holding that the remedy afforded by Section 10 of the challenged Act does not involve a multiplicity of suits to recover various successive payments of taxes that may be illegally exacted of plaintiff under said Act in successive years during the pendency of suits testing the validity of such Act.

(19) The Court erred in overlooking or disregarding the nature of this suit as a class suit brought by plaintiff pursuant to Equity Rule 38 and the order of Court made at its inception, on behalf of itself and a numerous class of other retail merchants similarly situated, many of whom are specifically designated in the orders of Court as protected by the temporary restraining order herein issued, and all of whom have a common or general interest in the various questions herein litigated, as to the constitutionaliality or validity of said challenged Act, and thus the Court erred in holding that no such multiplicity of actions is involved in the claims herein asserted by plaintiff on its own behalf and on behalf of other retail merchants similarly situated as would sustain equitable jurisdiction in order to prevent a multiplicity of actions at law between plaintiff and numerous other retail merchants similarly situated, and the defendants as set forth in the bill and in the orders of the Court in this cause.

(20) The Court erred in failing to hold that plaintiff's action is a class suit within the meaning of the 38th Equity Rule and is consequently maintainable in a Federal Court of Equity.

(21) The Court erred in holding that no basis for relief in equity is afforded by virtue of the drastic penalties provided in Sections 5 and 7 of the challenged Act for failure to comply with the terms thereof or to pay the illegal taxes exacted thereunder, when due according to the terms of said Act.

[fol. 151] II

Additional Assignments of Errors Committed by the Court in Its Interlocutory Decree Denying Plaintiff's Motion for an Interlocutory Injunction

(1) The Court erred in disregarding the rule laid down for such cases in Ohio Oil Company v. Conway, 239 U. S.

613-615, and in refusing to grant an interlocutory injunction to preserve the status of the parties until this cause could be fully heard and finally decided upon its merits.

(2) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act designedly denies to plaintiff and to other retail merchants similarly situated the equal protection of the laws in that, by reason of its classifications prescribed in Section 2 thereof, and its exemptions and credits or deductions provided in Section 4 thereof, and its consequent widely-varying rates of taxation, it unjustly and unreasonably discriminates against plaintiff and other retail merchants having a large volume of annual gross retail sales, and in favor of other retail merchants having gross annual retail sales in smaller volume, through its unreasonable and arbitrary exaction of taxes from plaintiff at excessive and grossly disproportionate rates arbitrarily levied in the higher brackets of said Act upon gross retail sales of larger volume, as compared with greatly reduced rates levied in its lower brackets upon other retail merchants having gross retail sales of smaller volume and therefore taxed at greatly reduced rates or, by reason of credits or deductions allowed them, not taxed at all.

(3) The Court erred in declining to consider the issue or question and in therefore failing to hold that the classification of retail merchants for purposes of taxation pre- [fol. 152] scribed in Section 2 of the challenged Act does not rest upon a reasonable basis, and does not have any reasonable relation to the subject-matter of the Act, and therefore effects an unjust and unreasonable discrimination against this plaintiff in the matter of taxation upon its gross annual retail sales as compared with the gross annual retail sales of other retail merchants having a smaller volume of such sales, and thus denies to plaintiff the equal protection of the laws guaranteed to it by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

(4) The Court erred in declining to consider the issue or question and in therefore failing to hold, upon the evidence adduced at the hearing of plaintiff's motion for an interlocutory injunction, that the challenged Act, in its

actual operation and effect, exempts, wholly or substantially so, from the burdens of taxation levied by said Act, competing retail merchants similarly situated, who have a smaller volume of gross sales than plaintiff, while at the same time levying upon plaintiff, with its larger volume of gross sales, excessive and exorbitant rates of taxation, wholly out of arithmetical proportion or any reasonable proportion to the volume of sales of other retail merchants exempted wholly, or substantially so, from the burdens of said Act.

(5) The Court erred in declining to consider the issue or question and in therefore failing to hold, upon the evidence adduced at the hearing, that the challenged Act denies to plaintiff the equal protection of the law in that, in practical effect, it operates to impose upon plaintiff a grossly excessive and disproportionate burden of the taxes levied under said Act, merely because of the larger volume of plaintiff's gross sales, and at the same time exempts, wholly or in part, from the burdens of said taxing law, [fol. 153] competitors of the plaintiff engaged in the same general business of retail merchants—all in complete disregard of capital invested by the taxpayer, or his ability to pay, or his earnings, income or profits accruing from his business of retail merchant.

(6) The Court erred in declining to consider and in failing to hold upon the evidence adduced at the hearing, that the challenged Act denies plaintiff the equal protection of the laws and unjustly and unreasonably discriminates against the plaintiff by reason of the fact that plaintiff with sales of $13,000,000 is required to pay a tax which is twice the combined tax which 16,374 retail merchants similarly situated with the plaintiff, would have to pay on $260,000,000 worth of sales.

(7) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act is unconstitutional and void under the Constitution of the Commonwealth of Kentucky, in that said Act, in each of the particulars specified in assignments (1) to (6), both inclusive, under this heading II, captioned "Additional Assignment of Errors Committed by the Court in its Interlocutory Decree Denying Plaintiff's Motion for an Inter-

locutory Injunction," violates the fundamental principles of uniformity in the matter of taxation levied upon occupations, persons or property upon a reasonable basis of classification, such as is required by the Constitution of Kentucky.

(8) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act is unconstitutional and void in that, as to taxes claimed of plaintiff on account of sales made in the period between [fol. 154] March 17, 1930, when said Act was approved, and June 17, 1930, when for the first time it properly became effective under Section 55 of the Constitution of Kentucky, it takes the property of this plaintiff under the guise of taxation measured by sales made during such period, before said challenged Act could properly become operative or effective for any purpose under the provisions of Section 55 of the Kentucky Constitution, and in such respects said challenged Act denies to this plaintiff the guaranty and protection of due process of law afforded to it under the Due Process Clause of the Fourteenth Amendment to the Constitution of United States.

(9) The Court erred in declining to consider and in failing to hold that the tax levied by the challenged Act is confiscatory and therefore deprives the plaintiff of its property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

(10) The Court erred in declining to consider and in failing to hold that the challenged Act is a burden on interstate commerce by reason of the fact that it taxes the sale of products moving in interstate commerce.

(11) The Court erred in declining to consider and in failing to hold that the challenged Act is a burden on interstate commerce and discriminates against products of States other than Kentucky by reason of the fact that it imposes a tax on the sale of farm products grown outside of Kentucky and exempts *slight* products raised in Kentucky.

[fol. 154½] Prayer for Reversal

Wherefore, for each and all of the reasons set forth in the foregoing assignments of errors, plaintiff prays that each of said decrees herein appealed from, namely, the in-

terlocutory decree and the final decree as hereinbefore set forth, be reversed with directions to the District Court to set aside both of said decrees, and in lieu thereof to render a decree in all respects in accordance with the prayer of plaintiff's bill of complaint.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.

Copy rec'd.

S. H. Brown, Asst. Atty. Gen.

[fol. 155] In United States District Court, Eastern District of Kentucky

Equity Docket No. 3908

The Kroger Grocery & Baking Company, Plaintiff,

vs.

John B. Lewis, Selden R. Glenn, and Henry M. Cline, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants.

Order Allowing Appeals—Filed March 1, 1932

This day came the parties, plaintiff and defendants, by their counsel, and plaintiff filed herein its petition for appeals to the Supreme Court of the United States from the interlocutory decree and the final decree herein rendered by this Court on December 9, 1931, and filed also its assignments of errors in support of its said petition.

Thereupon it is ordered by the Court:

1. That the appeals to the Supreme Court of the United States prayed by the plaintiff as set forth in its petition for appeal, be and they are each hereby allowed as prayed in said petition.

2. That a transcript of such part of the record and proceedings herein as the parties may by præcipe duly designate, be transmitted, duly authenticated, to the Supreme Court of the United States in the manner provided by law.

[fols. 156-160] 3. That a citation be issued, admonishing the defendants and each of them to be and appear in the Supreme Court of the United States within thirty (30) days from this date, as provided by law.

4. That one appeal bond for costs and damages upon said appeals, in the penal sum of One Thousand ($1,000.00) Dollars, shall be given by plaintiff, conditioned as provided by law, and in view of the fact that the plaintiff and all other taxpayers claiming the benefit of the temporary restraining order issued in this case have complied with the order and decree of this Court entered December 9, 1931, by giving a bond or other approved security for the payment of estimated taxes that may become due from them respectively for the calendar years 1930 and 1931, it is now ordered that said appeal bond for costs and damages, required herein, shall act as a supersedeas bond as well as a bond for costs and damages on appeal.

5. The citation upon appeal shall be issued and the appeal bond and surety thereon herein required shall be approved by the District Judge regularly presiding in this Court.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

Notice waived.

Batson, Cary & Welch, S. H. Brown, Asst. Atty. Gen.

[fol. 161] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION OF COUNSEL AS TO WHAT SHALL CONSTITUTE THE RECORD OF APPEAL—Filed March 24, 1932

It is hereby stipulated and agreed that the record on appeal in this cause in the Supreme Court of the United States shall consist of the following:

I. Bill of Complaint.

II. Application for interlocutory injunction.

III. Motion for temporary restraining order.

IV. Motion of defendants for an order in regard to plaintiff's book.

V. Motion of defendants for continuance.

VI. Order convening three judge court filed January 20, 1931.

VII. Temporary restraining order entered January 29, 1931.

VIII. Bond in the sum of Five Thousand ($5,000) Dollars filed January 29, 1931.

IX. Order authorizing plaintiff to sue as representative of a class, entered on January 31, 1931.

[fol. 162] X. Motion for extension of time to answer.

XI. Order extending time to plead.

XII. Order continuing temporary restraining order in force until hearing on application for interlocutory injunction, entered February 7, 1931.

XIII. Motion of the defendant to strike certain allegations from the plaintiff's Bill of Complaint.

XIV. Motion of the defendant to dismiss plaintiff's Bill of Complaint.

XV. Answer of the defendants.

XVI. Reply of the plaintiff.

XVII. Order of submission filed February 14, 1931.

XVIII. Order listing parties protected by restraining orders filed March 28, 1931.

XIX. Order in reference to Ben Snyder, filed April 15, 1931.

XX. Additional bond of the plaintiff in the sum of Ten Thousand ($10,000) Dollars filed on April 2, 1931.

XXI. Letter of James Martin and A. H. Brendel in regard to gross sales tax report analysis and analysis.

XXII. The affidavits of the following persons read in support of the application for an interlocutory injunction:

(1) Arch B. Davis.

(2) Robert W. Lyons.

(3) John B. Bonham and contract of Independent Grocers Alliance attached thereto as exhibit.

(4) W. A. Steiden and exhibits attached thereto.

(5) Gilbert J. Schneider and exhibits attached thereto.

(6) D. T. Petty and exhibits attached thereto.

(7) Albert B. Berger, and exhibits attached thereto.

[fol. 163] (8) John E. Donahue and exhibit attached thereto.
(9) John Scanlan and exhibits attached thereto.
(10) Chris Schumann and exhibits attached thereto.
(11) Louie J. Jones, and exhibits attached thereto.
(12) Brack M. Ferrill and exhibits attached thereto.
(13) Albert C. Huneke.
(14) Walter Wenderoth.
(15) Francis Ballard.
(16) Rufus Blume.
(17) O. W. Vaughn.
(18) John C. Schwarz.
(19) Ernest Thompson.
(20) M. R. Anderson.
(21) C. J. Henry.
(22) Harmon Noe.
(23) R. W. Owens.
(24) Crawford Lee.
(25) G. H. Parker.
(26) Robert J. McKim.
(27) Fred Levy.
(28) Dann Byck.
(29) C. B. Turley.
(30) Milton Marx.
(31) Daniel M. Cohen.
(32) H. C. Amstutz.
(33) L. M. Ross.
(34) Dolph Wile.
(35) C. H. Parsons.
(36) C. R. Leininger.
[fol. 164] (37) E. R. Probasco.
(38) B. E. Van Antwerp.
(39) W. H. Howell.
(40) E. C. Purvis.
(41) M. S. Gesley.
(42) A. C. Miller.
(43) O. A. Rhodes.
(44) W. T. Morgan.
(45) W. C. Jenkins.
(46) Robert Wright.
(47) H. H. Craven.
(48) T. B. Jones.
(49) P. O. Wolverson.

(50) C. W. Gowin.
(51) B. E. Willis.
(52) J. D. Delano.
(53) J. A. Gude.
(54) B. A. Aistrop.
(55) James W. Stites.
(56) Paul H. Nystrom.
(57) James R. Karibo and exhibits referred to therein.
(58) N. A. Bash and exhibits referred to therein.

XXIII. Narrative of the testimony of Shirley E. Haas.

XXIV. The affidavits of the following persons read by respondents in opposition to application for interlocutory injunction:

(1) Henry F. Walradt and exhibits referred to therein.
(2) James W. Martin and exhibits referred to therein.
[fol. 165] (3) Clyde W. Phelps.
(4) B. T. Brewer.

XXV. Narrative of testimony of Walter Burr.

XXVI. Certified copy of record in regard to House Bill No. 111 in the House and certified copy of Journal of Senate in regard to same measure.

XXVII. Opinion of the Court.

XXVIII. Order and decree denying interlocutory injunction and dismissing Bill of Complaint and continuing temporary restraining order in effect pending appeal upon the giving of bon-s entered on December 10, 1931.

XXIX. Bond of the following concerns in accordance with order of December the 10th:

(1) The Kroger Grocery & Baking Company.
(2) The Great Atlantic & Pacific Tea Company.
(3) Walgreen Company Drug Stores.
(4) G. R. Kinney.
(5) Melville Shoe Company.
(6) F. W. Woolworth Company.
(7) S. S. Kresge Company.
(8) Louis K. Liggett Company.
(9) S. H. Kress Co.
(10) National Bellas Hess Company.
(11) Sears Roebuck & Company.

XXX. Order approving bonds entered January the 9th, 1932.

XXXI. Stipulation of parties substituting J. Dan Talbott as party in place of Clell Coleman.

XXXII. Order substituting J. Dan Talbott as party defendant in lieu of Clell Coleman.

XXXIII. Petition for appeal filed March 1, 1932.

[fols. 166-168] XXXIV. Assignment of errors filed March 1, 1932.

XXXV. Order allowing appeal filed March 1, 1932.

XXXVI. Appeal bond.

XXXVII. Citation and endorsement of accepted service thereon.

XXXVIII. This stipulation of counsel as to what shall constitute record on appeal.

Robert S. Marx, John C. Doolan, James W. Stites, Harry Kasfir, Frank E. Wood, Solicitors for Appellant. Bailey P. Wooten, Atty. Gen.; S. H. Brown, Asst. Atty. Gen.; H. W. Batson, J. Whitcomb Welch, Leslie W. Morris, Solicitors for Appellees.

[fol. 169] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

Statement of Evidence

EXHIBIT IN EVIDENCE

Brendel 1

February 13, 1931.

Hon. J. W. Cammack, Attorney General, Commonwealth of Kentucky, Frankfort, Kentucky; Hon. Frank E. Wood, 900 Traction Building, Cincinnati, Ohio.

GENTLEMEN: As per your request of February 9th, we are attaching hereto a report showing the number of Gross Sales Tax Reports filed with the Gross Sales Tax Department of the Commonwealth of Kentucky, and an analysis of same up to and including February 12, 1931.

These statements were compiled under the supervision of Mr. Joseph Martin, Supervisor of the Gross Sales Tax Department, and Mr. A. H. Brendel of the firm of J. D. Cloud & Co., Certified Public Accounts, and we hereby cer-

tify that the attached statements are true and correct to the best of our knowledge and belief.

Respectfully submitted,

Joseph Martin, Supervisor Gross-sales Tax Department. A. H. Brendel, Certified Public Accountant.

[fol. 170] Number of Blanks Sent Out (Estimated by Mr. Martin), 55,000

Number of Reports Filed by Retail Merchants

	Number filed	Number indicating tax	Number indicating no tax
Showing retail sales less than $400,000	16,353	11,025	5,328
Showing retail sales between $400,000 and $500,000	9	6	3
Showing retail sales between 500,000 and 600,000	4	2	2
Showing retail sales between 600,000 and 700,000	4	3	1
Showing retail sales between 700,000 and 800,000	2	1	1
Showing retail sales between 800,000 and 900,000	1	.....	1
Showing retail sales between 900,000 and $1,000,000	.....	.....	.....
Showing retail sales in excess of $1,000,000	1	.....	1
Totals	16,374	11,037	5,337
Number of reports returned showing retail merchants out of business or not engaged in retail trade (Estimated by Mr. Martin)	1,060		
Total reports received	17,434		

[fol. 171]

Number of Reports Showing Tax Liability

	No. of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
Showing sales less than $400,000	16,353	$247,923,309	$121,741.66	$59,645.00	$62,096.66	$171,795.54
Showing sales between $400,000 and $500,000	9	4,034,504	2,422.40	1,303.71	1,118.69	6,233.71
Showing sales between 500,000 and 600,000	4	2,247,599	1,817.99	1,452.93	365.06	5,283.65
Showing sales between 600,000 and 700,000	4	2,585,035	2,518.57	1,108.12	1,410.45	177.20
Showing sales between 700,000 and 800,000	2	1,485,783	1,642.86	977.52	665.34	1.49
Showing sales between 800,000 and 900,000	1	814,559	636.15	636.15	.....	1,755.24
Showing sales between 900,000 and 1,000,000	.....	.....	.....	.....	.....	.....
Showing sales in excess of $1,000,000	1	1,325,934	6,309.35	6,309.35	.....	4,593.15
Totals	16,374	$260,416,723	$137,088.98	$71,432.78	$65,656.20	$189,839.98

Number of merchants ouside of First and Second Class Cities reporting over $400,000 sales..... Two.

Number of Merchants Reporting Sales of

	Showing tax liability	Showing no tax liability
Less than $10,000	4,897	3,666
$10,000 and under $25,000	3,668	1,108
25,000 and under 50,000	1,521	353
50,000 and under 75,000	455	111
75,000 and under 100,000	187	33
100,000 and under 150,000	152	28
150,000 and under 200,000	61	12
200,000 and under 250,000	34	9
250,000 and under 300,000	22	3
300,000 and under 400,000	28	5
Over $400,000	12	9
Total	11,037	5,337

[fol. 172] AFFIDAVIT OF ARCH B. DAVIS

STATE OF KENTUCKY,
County of Jefferson, ss:

Arch B. Davis, being first duly sworn, states:

I am vice-president of the Citizens-Union National Bank in Louisville, Kentucky. I have held that position for approximately fifteen years.

By virtue of my position I have bought, sold, and collected a large number of State Warrants of all varieties, particularly Highway, Institutional and General Warrants. I believe that I have handled as large a number of Warrants through our bank as any individual in the State.

My experience in dealing with warrants against the General Fund has been that said warrants are seldom paid in less than twenty months from the time when they are stamped interest bearing and I estimate that the average time within which said warrants are paid is two and a half to three years from the date when so stamped. Warrants are paid, in practice, in the order of their being so stamped. The last call by the State Treasurer included General Warrants stamped interest bearing on June 11, 1927, which would indicate that no warrants against the General Fund stamped since that date have been paid.

The financial statement issued by the State Treasurer as of December 31st, 1930, shows the state of the General Fund to be as follows:

[fol. 173] Amount of warrants outstanding against the General Fund $9,880,502.76
Amount in General Fund available to pay off same 12,565.81

The length of time probably elapsing before the payment of a warrant is, of course, an element to be considered in determining its value.

Arch B. Davis.

[Duly verified.]

[fol. 174] AFFIDAVIT OF ROBERT W. LYONS

STATE OF OHIO,
Hamilton County, ss:

Robert W. Lyons, being first duly sworn, makes the following declaration under oath:

I am Executive Vice-President of the National Chain Store Association, which is a trade group comprising a large percentage of the leading retail organizations in this country which own and operate under a common management, more than one store. For the purpose of this affidavit I shall adopt the expressions "chain stores" and "individual merchants" used in the title to House Bill No. 111, Acts of 1930, of the Kentucky General Assembly, as follows: "Chain stores" as meaning more than one store under single ownership and control as contrasted with "individual merchants," meaning a store, the owner of which, owns no other store. Among the functions of the National Chain Store Association is that of collecting and interpreting economic data relating to or influencing the operation of "chain stores." My duties as chief executive of said Association require constant study of the economics of distribution and constant research into the facts and circumstances of the various types of merchandising. My training, in preparation for such work, began in college with the study of economics, finance and law.

In 1915, I was employed as Manager of the Trade Extension and Research Department for the Indianapolis Division of a great rubber manufacturing company. Con-
[fol. 175] tinuing in this field, I became sales representative, special representative, district sales manager, and finally general sales manager. Succeeding this, I became general sales manager of three furniture manufacturing companies operating under unified financial control. Following this, I was actively engaged in the practice of law for a period of five years. For the past two years and one-half, I have been the executive officer of the National Chain Store Association. Acting in this capacity, I testified as an expert witness in the District Court of the United States for the Southern District of Indiana, Indianapolis Division, in the case of Lafayette A. Jackson, plaintiff, vs. State Board of Tax Commissioners and the State of Indiana,

William A. Hough, Pliny H. Wolford and Phillip Zoercher, as members of the State Board of Tax Commissioners of the State of Indiana, and James M. Ogden, Attorney General of the State of Indiana, defendants, in connection with the economics of distribution, as well as the functions and operating practices of the "chain stores" and its related or competitive retailing mechanisms. I was duly qualified as an expert witness in the said case and my testimony was so accepted

The best available records disclose that retailing in the United States is accomplished through approximately 1,500,000 retail stores, of which number approximately 150,000 retail stores are units in some "chain" of stores. Study further discloses that these 1,500,000 retail outlets do approximately forty-four billion dollars worth of business annually. Study further discloses that these 150,000 "chain stores" do a known volume of approximately 13.5% of the total annual volume of retail business in the United [fol. 176] States, or approximately six billion dollars annually exclusive of petroleum products sale. These 150,000 "chain store" retailing units are owned and controlled by approximately 8,000 unrelated and distinct management companies with a nation-wide distribution of stock ownership among several hundred thousand shareholders. Competition among the many chain store operating companies is very intense and keen and no co-operation or confederation of any kind exists or has existed for the purpose of lessening such competition.

There are approximately 25,000 retail stores in the State of Kentucky, doing an annual volume of sales of approximately $535,000,000. Of the total number of retail stores in the State of Kentucky, about 24,000 are single stores of "individual merchants" and 976 are "chain stores." The annual volume of sales of the single stores of "individual merchants" in Kentucky is approximately $462,750,000, and the annual volume of sales of "chain stores" in Kentucky is approximately $72,225,000. There are about 24,108 retail merchants in the State of Kentucky doing an annual volume of sales of $535,000,000. In the recent retail and wholesale trade census for eleven cities, commonly known as the Eleven Cities Census, conducted by the United States Bureau of the Census, an analysis was made of the significant facts of retail trade in an area embracing

roughly, 10% of the retail sales of the United States. This study disclosed that 98.23% of all independent retail stores do an annual business of less than $250,000 and that only 1.77% of all independent retail merchants do an annual volume of business in excess of $250,000 each. Applying [fol. 177] these ratios to the State of Kentucky, it is mathematically certain that 23,682 merchants do an annual business of less than $250,000 each and less than 400 merchants do an annual business in excess of $250,000. While no definitive study has been made to show what percentage of retail merchants do an annual volume of business in excess of $400,000, yet it is mathematically certain to be only a fraction of 1% of the total number of merchants. Only 14 of the "chain store" merchants operating in Kentucky do an annual volume of business in that state in excess of $400,000. From available information it is my belief that not more than 25 other merchants in Kentucky do an annual volume in excess of $400,000.

The chain store system of retail merchandising does not present any inherent or fundamental advantages over the single store unit of merchandising. Repeated study under the auspices of the U. S. Government, the U. S. Chamber of Commerce, various universities and many independent research organizations have emphasized that retail merchandising success is determined not by the type of merchandising structure or mechanism, but by the degree of the merchant's adherence to well established principles of merchandising. The fundamental requirements of successful merchandising which apply equally and are available equally to "chain store" and single stores of "individual merchants" are as follows:

1. A retail store must be well located, must have ready access to consumers.

2. The store must be attractive in its interior design and must constitute a pleasant trading place for its consumers.

[fol. 178] 3. It must maintain a steady supply of adequate stocks of goods and salable merchandise.

4. The factor of service must be carefully weighed and measured in relation to the needs and demands of customers and the requirements of competition.

5. The relations of employees to consumers must be carefully studied and developed.

6. Good management must be present.

7. Prices must be fair.

The "individual merchant," through his familiarity with the community and through the co-operation of established realtors, is perhaps better able to secure attractive leases than the "chain stores."

In the matter of store design, a great many independent organizations exist to assist the owner of one store in making his place modern and attractive. The service departments of the widespread co-operative buying and selling organizations are giving expert guidance to the individual merchant in this field. Manufacturers of store fixtures and equipment, with their designing and engineering departments, are also assisting in this work.

The "chain stores" have no monopoly or control of merchandise of any character. There is not a single class or quality of merchandise in which they deal that is not available to the "individual merchant" operating the single unit store, nor does the factor of large scale buying differentiate the "chain store" operator from the "individual merchant" in respect to this element. It is clear, that the advantage of buying in quantity arises from the amount of capital employed and the amount of consumption avail- [fol. 179] able and not from the fact that the sales are made through multiple outlets rather than through one outlet. The economies in quantity buying do not continue beyond a certain point. A "chain store" owner or an "individual merchant" may acquire a car load of merchandise at a more reasonable figure both as to price and as to transportation cost, but the second car load so acquired will not necessarily represent an additional saving in price and in freight.

Economists have generally recognized that the industrial prosperity of the United States rests upon the production of standardized articles in large volume, at low cost per item. While there are several distinct practices in retailing as it relates to volume and price, yet it is well recognized that a very important modern trend in retailing has been the development of large volume sales at the lowest

possible prices. Other retailers have attained marked success by specialization in service and products at higher prices. The "chain stores" have been conspicuous in developing distribution on a large volume and low cost price per item basis with the resulting benefit to the great mass of the American consuming public. The introduction of efficient methods in the distribution of merchandise has necessarily resulted in stimulating general competitive conditions; has resulted in reducing operating expenses which, in turn, has made it possible to sell the goods to the public at lower prices with the result that the entire public has benefited from the competition instituted by the "chain stores."

In order to accomplish large volume sales at a low price per unit sale, the retailer is required to accept a small per- [fol. 180] centage of profit on the individual sales which is illustrated by the fact that during the year 1930 the average earnings of all department stores handling great varieties of merchandise were only 1½% of their net sales and an even smaller percentage of gross sales because of the established practice of department stores in accepting the return of unsatisfactory merchandise and the fact that such merchandise represents a substantial volume which is necessarily deducted from gross sales, thereby inevitably modifying the percentage above given. In this connection it should be noted that the best managed companies in the retail grocery field are able to earn on their large volume of sales only from 1½ to 2% net. Figures from the extensive department store studies for 1928 of the Harvard Bureau of Business Research show that department stores with net sales of less than a million dollars are not able to earn as much as 1% on sales and that the earnings of stores with sales above $1,000,000 average only 1.96% of sales.

Because of the wide variation between gross sales and net sales, it is obvious that a tax of 1% on gross sales will command a tax payment greatly in excess of 1% on net sales. Such a tax will consume a large proportion of the net earnings of "chain stores" and department stores; the amount consumed by such a tax will vary from 50% to 66-2/3% of all the net earnings of stores falling within the above averages.

Furthermore, a sales tax so accelerated as to place disproportionate burdens upon various classes of retailers cannot as a practical matter be shifted to the consumer because of the fact that those who pay the highest rate are forced [fol. 181] to compete with those who pay the lowest rate or nothing.

Furthermore, the retail price of many products is determined by Interstate or even International competition and the Kentucky retailer is powerless to successfully establish prices out of line with the market price so fixed. Kentucky retailers must also compete with various nonresident mail order and catalogue houses and all Kentucky retailers located in cities close to the State line are forced to compete with merchants across the State line who suffer from no such tax.

A disproportionately accelerated tax results in the further inequality of requiring the Kentucky department store, with a million dollars of aggregate sales, to compete at a disadvantage to its various departments with "chain store" specialty shops doing a larger volume of net sales in their particular line than does the department store while being required to pay only 1/20th as much tax, or perhaps none. This is illustrated by the case of Levy Brothers of Louisville, Kentucky, whose sales exceed a million dollars and who must compete on the sale of men's clothing with the Louisville store of the Richman Brothers Company, which is the only store of this company in Kentucky, but directly related to many other large stores in a national system. In the face of such competition, Levy Brothers cannot possibly raise their men's clothing prices to the consumer in order to offset the 1% tax which they will pay. Such a tax would necessarily come out of earnings and frequently out of capital and would be prohibitory and confiscatory on retail grocery store and department store enterprises.

[fol. 182] The best available figures indicate that the average operating expense in retail grocery enterprise is about 18% of gross sales. It is manifest, therefore, that a tax of 1% on gross sales would, at a single stroke, increase the operating expenses of retail enterprise by 5.55%. Because of the intense price competition which characterizes all branches of present-day retail trade, it would be impossible for a limited group of retailers to readjust their retail

price so as to absorb an additional operating expense of 5.55%.

There is a common notion, which is quite unfounded, that certain types of retailing establishments enjoy special advantages not available to other types of retailers and that certain taxes should be based upon distorted graduations designed to correct existing inequalities. An examination of competition in the retail grocery field will indicate the fallacy of such reasoning. The "chain stores" were the first to reduce food retailing to a basis of operating efficiency. It appeared temporarily that by the introduction of scientific management into the field of retailing, "chain stores" had secured a distinct advantage over competitive retailers. Almost immediately, however, there began to develop a nation-wide movement among independent retailers to group themselves into co-operative organizations known as "voluntary chains." Such organizations perform for their members much the same function performed by the regular "chain stores" in all matters of group buying, sales and display service, equipment, layout, advertising, accounting and stock control systems, etc. There are at the present time, more than 500 of these so-called [fol. 183] "voluntary chains" of independent retailers, comprising more than 60,000 retail stores. A number of such "voluntary chain" store organizations operate in the State of Kentucky, among which are the following:

Independent Grocers' Alliance.
Associated Community Stores.
James Grocery Company.
Ohio Valley Grocery Company.
Merchants Wholesale Grocery Company.
National Grocery Company.

The advantages derived by membership in the "voluntary chain" are practically identical with the advantages enjoyed by the regular "chain store". Each represents a fundamental attempt to bring organized intelligence and scientific methods to the operating problems of retail distribution. By pooling their buying resources, the members of the so-called "voluntary chains" are able to purchase their supplies on an equal footing with any existing competition. The development of the "voluntary chain" has made it possible for the jobber to materially reduce his

handling, warehousing, shipping, unloading, clerical and selling expenses, and the savings thus effected are passed on to the retailers in the form of reduced prices, dividends or bonuses.

The retailer member of the "voluntary chain," furthermore, gets the advantage of the very best supervision and advice, with the result that his stock of merchandise does not exceed that of the average regular "chain store" and his turnover of inventories is quite often more rapid than that [fol. 184] of the regular "chain store," thus saving him substantial interest on invested capital. Like the regular "chain stores," the members of the "voluntary chain" are able to economize in their advertising expenses and secure the maximum results at the minimum of cost. Even where the individual retailer is not affiliated with the "voluntary chain" or co-operative organization, he enjoys many advantages in purchasing his supplies which the "chain store," because of the magnitude of its requirements, cannot enjoy. In purchasing butter, eggs, apples, potatoes and all kinds of vegetables and garden crops, the individual retailer has access to individual farmers or producers from whom he can purchase in small quantities, on a day-by-day basis, and to whom he can often make payment for such purchases by exchanging other merchandise in which he has a substantial margin of profit. As against such opportunities, the "chain store" must necessarily purchase in large quantities which are delivered to a central warehouse from which such quantity purchases must be redistributed to the individual store. The various wholesale and retail grocery associations of America have repeatedly insisted that their respective members could purchase and distribute at retail just as cheaply as the "chain store." The truth of this statement is obvious and "chain store" companies have repeatedly had the experience of opening a new store in an apparently favorable neighborhood only to find that previously established retailers were so alert and efficient as to make it advisable to close said store. Furthermore, "chain store" operating companies have often operated a new store successfully for a year or two years [fol. 185] in competition with an indifferent retailer who has suddenly awakened to the necessities of competition and so thoroughly adjusted himself to it as to make it un-

profitable for the "chain store" to continue in that neighborhood.

Almost without exception, the existing differences in price and value offered by the "chain store" and competitive merchants can be traced directly to the differences in the service rendered by these respective types of retail establishments. In the matter of service to customers, the alert, individual merchant may easily have many advantages over his "chain store" competitor. His more intimate knowledge of the tastes and peculiarities of his community, his capacity to render service of many kinds extending beyond the boundaries of those rules and regulations which are necessary to "chain store" operation, give him a distinct advantage in building customer good will. He has a great advantage over the "chain store" in directing his employees, in the general management of his store, and in the rapid adjustment of his prices to meet competition and is always immediately aware of every circumstance and requirement of his local situation.

There is a common misapprehension to the effect that "chain store" competition has resulted in driving out of business the individual, or so-called "independent merchant". The error of this conclusion is clearly indicated by a study of this question conducted by Dr. Paul C. Olsen of the University of Pennsylvania (following the recent Louisville Grocery Survey, conducted under the auspices of the United States Department of Commerce), in order to determine the exact influence of "chain store" develop- [fol. 186] ment upon the mortality of competitive retailers in the grocery field. Dr. Olsen studied two periods of nine years each and so widely separated in point of time that in the first period, there were practically no "chain stores" in existence and in the second period, "chain stores" had reached the very peak of their development. The first period studied was from 1891 to 1899, inclusive. The second period studied was from 1921 to 1929, inclusive. Dr. Olsen's study discloses that from 1891 to 1899, inclusive, new retail grocery merchants entered the field in Louisville at the average rate of 23% per annum. The year by year figures for this period are as follows:

1891	24 per cent
1892	24 per cent

1893	22 per cent
1894	22 per cent
1895	23 per cent
1896	22 per cent
1897	21 per cent
1898	22 per cent
1899	23 per cent
Average	23%

Dr. Olsen's study also discloses that during this period from 1891 to 1899, inclusive, retail grocery merchants failed in Louisville at the average rate of 23% per annum. In other words, during this early period, when there was no "chain store" competition, the death rate among Louisville retail grocery businesses equaled 100% of the birth [fol. 187] rate of such businesses. The year by year mortality figures for this period are as follows:

1891	22 per cent
1892	22 per cent
1893	22 per cent
1894	21 per cent
1895	27 per cent
1896	22 per cent
1897	23 per cent
1898	21 per cent
1899	24 per cent
Average	23%

Between the years 1921 to 1929, inclusive, chain stores reached their peak development in the City of Louisville and yet Dr. Olsen's survey discloses that during this period the birth rate for new businesses in the retail grocery field was 25% per annum. The year by year figures are as follows:

1921	25 per cent
1922	25 per cent
1923	25 per cent
1924	24 per cent

1925	26 per cent
1926	26 per cent
1927	25 per cent
1928	24 per cent
1929	22 per cent
Average	25%

[fol. 188] Dr. Olsen's study also discloses that during the period from 1921 to 1929, the mortality rate among Louisville retail grocers fell substantially below the birth rate of said retail grocers—the mortality rate during this period averaging only 24% per annum as against a birth rate of 25% per annum. The year by year mortality figures for this period are as follows:

1921	22 per cent
1922	21 per cent
1923	21 per cent
1924	25 per cent
1925	24 per cent
1926	27 per cent
1927	24 per cent
1928	24 per cent
1929	26 per cent
Average	24%

Even the most superficial examination will disclose that the so-called "chain stores" have been no more immune from failure than has any other class of commercial enterprise. While it often happens that the failure of a "chain store" organization represents such a large amount of capital and such substantial business problems that some larger or more successful organization absorb it rather than to allow it to liquidate in bankruptcy, just as happens in any other class of business where the units are large, the fact nevertheless remains that there have been many substantial "chain store" failures, among which are the following:

[fol. 189] A. A. Adams Stores.
National Drug Company.
Schulte United.

Neve Company.
National Grocery Company of Detroit.
Clarence Saunders Stores.
Almar Stores.
Page & Shaw.
Continental Chain Store Corporation.
City Stores Company.
G. & M. Stores.
Southern Stores Corporation.
Remington Hardware Stores.

Kentucky has had its representation among the list of "chain store" failures. The following "chain store" firms formerly operated in Kentucky and have either gone out of business through failure or gone into receivership or some equivalent re-organization program:

Home Owned Stores.
Cohn Stores.
United Chain Stores.
Clarence Saunders Stores.
Schulte Stores.

It is reasonable to expect that if a 1% gross sales tax, representing such substantial increase in operating cost, is added to the expense of doing a "chain store" business in the State of Kentucky, the resultant hardship will substantially increase the list of such failures.

Robert W. Lyons.

[Duly verified.]

[fol. 190] AFFIDAVIT OF JOHN B. BONHAM

STATE OF OHIO,
Hamilton County, ss:

John B. Bonham, of lawful age, being first duly sworn, deposes and says as follows:

I am 47 years of age and reside with my family at Cleves, near Cincinnati, Ohio. I am at present Vice-President of The Kroger Grocery & Baking Company, in charge of the operations of that Company, which includes purchases, store operations, sales, transportation and advertising. I began

in the grocery business a number of years ago at the bottom and have worked my way gradually through every branch of the grocery business to my present position, which I have held for several years last past. I am thoroughly familiar and conversant with practically every phase of the grocery, meat and vegetable business, and of the methods, practices and economics of wholesale and retail food merchandising and distribution.

The Kroger Grocery & Baking Company is an Ohio corporation and its principal office and place of business is located at Seventh and Walnut Streets in the City of Cincinnati, Ohio. For convenience, I shall use the word "Kroger" in referring to The Kroger Grocery & Baking Company.

Kroger has been in business for approximately forty-seven (47) continuous years. The business was originated by B. H. Kroger, who, until recently, was President of the Company, then Chairman of its Board of Directors, and [fol. 191] is at present a Director. Our records show that B. H. Kroger commenced business in one grocery store, located at No. 66 East Pearl Street, in the City of Cincinnati, Ohio. Kroger still operates that store. He endeavored to sell good food to the public at the lowest possible price and applied all of his ability and industry to making a success of that store. His methods and policies brought him public patronage and good will and his business developed to such an extent that it was necessary for him, in order to serve his patrons to the best advantage, to open additional stores. As a result of good management and the application of progressive and efficient methods and practices of merchandising and the continued policy of selling good food, meat and vegetables at low prices, a large and increasing sales volume was developed and the reputation of Kroger stores spread from Cincinnati across the river to adjoining Kentucky towns and cities, including Covington, Newport, Bellevue, Dayton and vicinity. The number of customers who came to Kroger Cincinnati stores from across the river in Kentucky and to whom free deliveries were then made from Cincinnati stores made it advantageous and convenient for the customers to be served from stores located in Kentucky and more than thirty (30) years ago Kroger opened a retail grocery store in the State of Kentucky and this store was continued along the same

lines which had theretofore met with public favor and patronage. One of the first stores was located at the corner of Fifth and Columbia Streets, Newport, Kentucky, as early as March, 1897. By 1899 there were additional stores at the Northeast corner of Eighth and Monmouth Streets, [fol. 192] Newport, Kentucky, Fifth and Scott Streets, Covington, Kentucky, and at the Northwest corner of Sixth and Berry Streets, Dayton, Kentucky. By 1905 Kroger had eight (8) stores located in Newport, Covington, Bellevue and Dayton, Kentucky, and seven (7) of said stores sold meat. All of these stores are still conducted. Our records show that more than twenty-five (25) years ago Kroger, in connection with said stores, publicly advertised—"It is the combination of highest quality groceries at lowest prices that has built up our immense business." The business of Kroger in Kentucky continued to grow, and in order to serve Kroger customers in the most convenient locations and to the best advantage, Kroger gradually increased the number of stores and localities served in Kentucky over the past quarter of a century until today Kroger has two hundred and sixty-three (263) separate retail grocery stores in various localities throughout the State of Kentucky. Many of these stores were established in response to requests on the part of citizens requesting the establishment of such store in their community.

In the course of the development of the business, separate meat and vegetable departments were added to some of the larger stores and at the present time a number of the stores are known as complete food markets, selling groceries, meats, fruits and vegetables.

The business was not incorporated until April 3, 1902. Prior to that time it was largely owned and managed by B. H. Kroger. The growth of the business and competitive conditions made it necessary from time to time to secure additional capital and in 1902 the business was incorporated. [fol. 193] Thereafter, the general public was given an opportunity to subscribe to the capital of said Company by the purchase of stock therein, and at the present time there are sixteen thousand seven hundred and eighty-five (16,785) separate individual stockholders, located in practically every State of the United State, including a large number who reside in the State of Kentucky. This number necessarily changes from day to day and has been gradually increased.

Kroger business has grown in a similar way across various State lines and Kroger is today engaged in business in the adjoining States of Indiana, Tennessee, West Virginia, Illinois and other States in the middle west.

Kroger, ever since the establishment of its first store in Kentucky, for a period of more than thirty (30) years, has complied with all of the laws of Kentucky and particularly with the laws relating to foreign corporations, and has at all times been properly authorized to do business in Kentucky.

Kroger has made large investments in the State of Kentucky. It has invested large sums in store fixtures and equipment of its stores and in improvements to leaseholds. It has entered into numerous leases for stores, warehouses, etc., in Kentucky, which, in many cases, have a number of years to run. Kroger owns a large warehouse located in the City of Louisville, Kentucky. Kroger also has large sums invested in various personal property in addition to real estate and leaseholds, such as merchandise, transportation equipment, etc.

[fol. 194] Kroger has also invested large sums in intangible items in order to build and develop customer good will and patronage, such as advertising in newspapers and other publications and by way of posters, placards, etc. Kroger expenditures for real estate, rent, for improvements to leaseholds and for work and labor incident to the operation of its Kentucky warehouses and stores have all been made in Kentucky and, other than exceptional cases, have been made to residents of Kentucky. Kroger expenditures for advertising, previously referred to, have been largely expended in Kentucky publications. All of our stores and property in Kentucky are subject to the same taxes, licenses and fees as are imposed generally throughout the State and in the various counties and municipalities where our business is located.

Kroger is paying and has regularly paid, during all of the years it has been conducting a business in Kentucky, all taxes imposed by law, such as the property or ad valorem taxes, occupational taxes, license taxes, and county and municipal taxes. Kroger purchases the light, heat and power used in its business from Kentucky utilities. Generally speaking, except for the purchase of supplies and merchandise which Kroger must purchase,

like everyone else, from the available sources of supply, wherever the same may be located, the money received from the sale of merchandise in Kentucky is expended in Kentucky for taxes, rents, wages, light, heat, power, warehousing, transportation, advertising, etc. Kroger likewise purchases large quantities of supplies in Kentucky, as hereafter set forth. Kroger also pays $16,488.50 for special license taxes. This is the aggregate amount of the [fol. 195] amount paid by the several stores and averages $62.32 per store.

As examples of the above, during the past year, Kroger expended in Kentucky for rent about Three Hundred Forty-two Thousand ($342,000) Dollars; for salaries to employees, One Million Four Hundred Fifty-four Thousand ($1,454,000) Dollars; for the purchase of produce and other merchandise, Two Million Three Hundred Thirty-eight Thousand ($2,338,000) Dollars; and for transportation and truck operations, Three Hundred Fourteen Thousand ($314,000) Dollars. These sums are in addition to the expenditures for taxes, equipment, advertising and permanent investments in real estate, warehouses, etc.

For convenience in the management of its business, Kroger has divided the territory served by it in Kentucky into four divisions. Each of these four divisions is served from a separate branch, namely the Louisville, Kentucky, the Cincinnati, Ohio, Charleston, W. Va., and Herrin, Illinois, branches. The Louisville branch serves from the warehouse located in that city, stores located in the following territory: Louisville, Lexington, Paris, Winchester, Georgetown, Frankfort, Shelbyville, Somerset, Danville, Pineville, Owensboro, Henderson, Hodgenville, Elizabethtown, Bowling Green, Bardstown, Mt. Sterling, Lancaster, Versailles, Carrollton, Midway, Nicholasville, Wilmore, La Grange, Campbellsville, Harlan, Mt. Vernon, Stanford, Lebanon, Springfield, London, Middleboro, Corbin, Madisonville, Hopkinsville, Eminence, Lawrenceburg, Owingsburg, Irvine, Harrodsburg and Owenton. Kroger has only one store in each of the twenty-nine last named munici- [fol. 196] palities. The Louisville branch also serves stores located in Evansville, East Auburn, Jeffersonville, and other towns in the State of Indiana. The manager of the Louisville branch is W. A. Steiden.

The Cincinnati branch serves from a warehouse located in Cincinnati, Ohio, Kroger stores located in Covington, Newport, Dayton, Bellevue, Cynthiana, Ludlow, Ft. Thomas, Maysville, Clifton, Southgate, Alexandria, Silver Grove, Erlanger, Bromley, Florence, Ft. Mitchell, Elsmere, Augusta, Williamstown, Carlyle, Walton, Flemingsburg and Falmouth. In the fifteen last named municipalities, Kroger has only one store in each municipality. The Cincinnati branch also serves from the same warehouse, Kroger stores located in Cincinnati and adjoining territory in the State of Ohio. The Supervisor of the stores in Kentucky which are served from the Cincinnati branch is Albert B. Berger.

The Charleston, West Virginia, branch serves stores located in the following Kentucky municipalities: Pikesville, Prestonburg, Paintsville, Louisa, Russell, Greenup, Olive Hill, Grayson and Ashland. In all of the above municipalities, except Ashland, Kroger has only one store in each municipality. In Ashland, Kroger has five stores. The Manager of the Charleston, W. Va., branch is S. S. Rich. The Charleston, W. Va., branch also serves Kroger stores located in Charleston and surrounding territory in the State of West Virginia.

The Herrin, Illinois, branch serves the Kroger stores located in the following Kentucky municipalities: Paducah, Mayfield and Murray. Kroger has only one store in [fol. 197] Mayfield and one store in Murray. The same branch also serves Kroger stores located in Herrin and surrounding territory in the State of Illinois.

Each of the 263 Kroger stores is operated as a separate grocery store. Each store is managed by a local store manager who has charge of his own employees in his store. Separate accounts are kept for each store. The above list of stores indicates the wide separation in the localities in which our stores are located. The sales of one store are not affected by the sales of a store in a different location. It is not economical or practicable to move unsalable merchandise from one store to another because the cost of doing so is prohibitive. The amount of such merchandise in practice is so small that it does not warrant sending a truck to get it, to say nothing of the fact that when merchandise is delivered to a store the original packages are destroyed and the physical act of re-assembling same for

transfer to another place is impracticable. In addition, the bookkeeping and accounting problems at the central location involved in such a transaction make this practice uneconomical and unworkable. A large number of our stores sell meats, poultry, dairy products, fruit and vegetables in addition to groceries. Other stores carry a more restricted and limited line of merchandise. Many of these stores do not handle meats and poultry. The meat and poultry department is an entirely separate department or division of Kroger business. The employees in charge of this department are independent of the employees in the Grocery Department.

[fol. 198] Kroger grocery stores are in direct competition with other grocery stores in each locality where Kroger conducts a store. The Kroger meat departments are in direct competition with meat stores in said localities, which are limited to the sale of meats or which are departments of other grocery stores. Kroger and all other grocery and meat stores handle the same or similar merchandise, and competition between said stores is based upon quality, price, service, efficiency, sanitary conditions and attractiveness in store arrangement and display of merchandise.

The grocery and food field is a highly competitive one. Thousands of merchants are competing in this field. Kroger has at all times, and is at present, required to meet competition from individual merchants who own but one store, and also from individual merchants who own one store, but cooperate with wholesale grocers or with other individual merchants in large co-operative associations, and also from grocery stores the owner of which owns two or more stores. In many cases, the keenest and best competition in the matter of quality, price, service and general attractive and sanitary display of merchandise comes from individual merchants who own but one store. In a number of cases, the wide-awake individual merchant has been able to attract such a large proportion of the trade of his particular locality, that our Company has been unable to maintain a store in said locality in competition with such merchants, and said store has been closed. In Kentucky, as well as elsewhere, we have had to face keen competition from individual merchants who own one store, but who co-operate [fol. 199] with hundreds of other store owners in co-operative associations. These co-operative associations fall into

three general classes. Some of them are sponsored and served by wholesale groceries, a second class are associations of retailers who own a wholesale distributing house, and a third group is a co-operative buying and merchandising association. All of these co-operative organizations combine a large number of retail grocery stores individually owned, but voluntarily co-operating for the purpose of obtaining the advantages of group or mass buying in carload lots, group or mass distribution of merchandise through co-operative facilities, and group or mass advertising of merchandise. The largest of these associations which operate extensively in Kentucky is the Independent Grocers Alliance, commonly known as the I. G. A. The I. G. A. has approximately 10,000 stores in the United States, chiefly in the middle west. It has about double the number of stores operated by Kroger. I am informed and believe that all of said I. G. A. stores are parties to a contract, of which a copy is hereto attached, and marked Exhibit A. Each of said I. G. A. stores is painted in the same distinctive style; each is arranged and decorated according to a general and uniform plan; each of said stores advertises I. G. A. merchandise in a group with other stores. Each of said stores offers for sale a list of goods known as "highly competitive items," which are sold to member stores by the wholesaler at wholesaler's cost, plus not to exceed 3%. In addition to I. G. A., Kroger stores compete in Kentucky with the following co-operative organizations: Associated Community Stores, Ohio Valley Grocery Company, James Grocery [fol. 200] Company, Merchants' Wholesale Grocery Co., and National Grocery Company. Membership in said co-operative organizations or so-called "voluntary chains" is open, upon the payment of a small fee, to all individual merchants who are thus in a position to avail themselves at their option, of whatever advantages there may be in group or mass buying, merchandising, advertising, and scientific store arrangement, window display, etc. We also have competition from merchants who own two or more stores. The result of the intense competition in the grocery and food field has been to lower food prices to the consumer throughout the United States, including the State of Kentucky, and to bring about more sanitary conditions, and a more attractive display of merchandise in grocery stores.

Kroger has always built its business upon the policy of selling good food and merchandise to the consumer at the lowest possible prices. In order to accomplish this, it has been necessary to sell a large volume of merchandise at a small margin of profit on individual items. The profit which plaintiff is endeavoring to make in order to sell its merchandise at the lowest possible price has averaged from 2 to 2½% of its gross sales. However, competition, particularly in the matter of competitive prices, has been so keen during the past few years that although the gross sales of Kroger have steadily increased, the percentage of profit which said Company has been able to earn has steadily decreased. From 1926 to 1929, the sales increased from One Hundred Forty-six Million Nine Thousand Three Hundred Seventy-three ($146,009,373) Dollars to Two Hundred Eighty-four Million, Nine Hundred Fifty-three Thousand [fol. 201] Four Hundred Forty-eight ($284,953,448) Dollars and the reported percentage of profit for all sales decreased from .0288 in 1926, to .0223 in 1929. The combined sales of all Kroger stores and the average percentage of profit to said sales during said years was as follows.

	Sales	Average net profit
1926	$146,009,373	.0288
1927	161,299,604	.0271
1928	207,373,551	.0257
1929	284,953,448	.0223

The figures for 1930 are not yet available, but will be supplied as soon as the same have been compiled. My estimate of sales for 1930 is $267,086,028 and the percentage of profit on said sales will be under 2%.

Our Kentucky sales for 1929 were approximately $12,635,115. Owing to economic and competitive conditions prevailing in Kentucky, we sustained a loss on Kentucky business during the years 1929 and 1930. Our sales in Kentucky for the year 1930 were approximately $14,653,448.22, of which approximately $11,639.18 of sales were made between March 17, 1930, and December 31, 1930.

My experience is that earnings or net profits do not increase because of an increase in sales volume or in relation thereto.

There are many other factors which affect profits or earnings. Sound management, efficiency in operation, rents,

taxes, wages, spoilage, competitive prices, proper personnel, market conditions, transportation costs, commodity [fol. 202] prices, interest rates, damage suits, claims, litigation and unforeseen contingencies which always arise and cannot reasonably be anticipated or named here, are all important factors upon which profits or earnings depend. An unexpected drop in commodity prices for coffee or sugar or other staple items of which we carry a large inventory, may frequently cause inventory losses which vitally affect profits.

As a further illustration of the fact that profits have no necessary relation to sales, we have a number of stores located in Kentucky and elsewhere in the United States which have gross sales of $35,000 or under which show a profit from the operation of said stores, whereas numerous other stores with gross sales from $50,000 to $90,000 are operated at a loss. A large sales volume may result from special advertising on a large scale but the advertising expense may absorb any profit from such sales increase. Special or distress sales at low or competitive prices frequently move large quantities of merchandise and increase sales volume without profit to the distributor. The lack of relationship of mere sales volume to net earnings or profits, is further illustrated by the fact that a number of stores with which we are in competition and which have a smaller sales volume than our stores, make a larger percentage of net profit. This is frequently due to the fact that the individual store owner endeavors to build his business upon a service basis offering credit, delivery service, a wide selection of merchandise, including numerous luxury items, which are not handled by Kroger stores, and by reason of the foregoing obtains a higher price at a larger margin of profit than competitive [fol. 203] stores which cater more particularly to the average consumer, who does not require special service or luxury items. I have observed that the same thing is true of other businesses with which I have had contact, and that large sales or small sales are not the measure of net profits. Frequently concerns with large gross incomes have net losses and other concerns with considerably smaller gross incomes have large net profits.

I have read the Kentucky Gross Sales Tax Law, and know that the law purports to tax the first $400,000 of gross sales at one-twentieth of one per cent, the next $100,000 at two-twentieths of one per cent, and then jumps three-twentieths

of a per cent for each additional $100,000 of gross sales until $1,000,000 is reached, after which the tax is one per cent. I know of nothing in the grocery, meat, poultry or vegetable business which would tend to make $400,000 a dividing line upon which to base anything with relation thereto. The tax jump based on each $100,000 increase in sales is not based upon any means or methods of classification or accounting known to the grocery business. Our average sales per store in Kentucky are about $50,000. An increase of $100,000 in our sales is approximately the sales of two stores, which would make the tax rate jump three-twentieths of a per cent for every two stores which we operate after the first ten, until we reach the twentieth store, when the tax becomes twenty times greater for our twenty-first store than for our first store.

In the operation of our business we make purchases in many different states of the United States in varying quan- [fol. 204] tities, large and small, in order to supply our trade in Kentucky. This merchandise includes all varieties of food products, meats, fruits, vegetables, dairy and creamery supplies and garden and farm products of all kinds. Some of this merchandise is shipped from the states where the same is grown, produced or processed outside of Kentucky to our stores located in the State of Kentucky, where the same is sold at retail. Many of these items are sold in the original packages and containers in which the same are packed or contained for shipment. Many of the items sold in our stores in Kentucky, which are near the borders of the various states bordering Kentucky, are sold to non-residents of Kentucky, living across such state lines. Such goods are transported, carried or delivered to the purchasers thereof from said Kroger stores in Kentucky. For example, one of our stores is located at Middlesboro, Kentucky, which is near the juncture of the Tennessee, Virginia and Kentucky lines and many sales are made from this store to non-residents of Kentucky, living in Tennessee or Virginia. While we purchase in Kentucky for sale in Kentucky stores all available items, including more than three-fourths of our produce, more than sixty (60%) per cent of our meats and a large amount of other items, climatic and manufacturing conditions are such that we are required to purchase a large volume of grocery supplies in other states. For these reasons, we are extensively engaged in

interstate trade and commerce, and ship and transport between Kentucky and other states and sell to customers, both residents and non-residents of Kentucky, groceries, [fol. 205] meats, dairy supplies, and garden and farm products. We sell in our Kentucky stores at retail a large volume of garden and farm products, most of which are produced and grown by Kentucky farmers, and also a large volume which is grown and produced on farms in other states of the United States by farmers residing in such other states.

Kroger also operates, manages and farms a large farm, consisting of 370 acres, located in the State of Ohio, near Cleves. This farm is named "Country Club Farm" after the "Country Club" brand, which is one of our best known and advertised brands. Kroger raises and produces on this farm, cattle, sheep, hogs, poultry, milk and other garden and farm products. Some of the products from the Kroger farm are sold at retail in Kroger stores located across the river in Kentucky, at Covington, Newport and vicinity.

Kroger owns a packing plant, located in the City of Cincinnati, Ohio. Cattle, sheep and hogs raised on the Kroger farm are slaughtered and processed in this packing plant and the meat therefrom is transported to Kroger stores for sale at retail, including Kroger stores located in the State of Kentucky.

Kroger also owns a dairy plant, located in the City of Cincinnati, Ohio. Milk from the Kroger farm is sent to this plant, where the same is processed and transported to Kroger stores for sale at retail, including Kroger stores in Kentucky. I am informed and believe that other large dairies own farms in Ohio and Indiana and transport milk and dairy supplies to Kentucky for sale there at retail.

[fol. 206] Kroger has consistently maintained a policy of having its stores bright, attractive in appearance and maintained in strict conformity with all of the sanitary and health regulations with respect to the sale of food, produce and milk. The sale of good foods under sanitary conditions, prepared, processed and kept in conformity with approved health regulations is beneficial to the public welfare and public health. There is nothing about the maintenance or operation of any Kroger store which is injurious to public health, public welfare, public morals or public safety.

The basis upon which Kroger has built its business by

selling at low prices and relying upon a large volume of sales for a profitable return upon the value of its business is of great benefit to the consuming public. It has enabled the public to obtain food at the lowest possible prices. It contributes to eliminate waste in distribution and Kroger in many instances distributes food in direct line from the producer to the consumer. This results in the most efficient and economical distribution of foods, meats, dairy and farm products, which economical and efficient distribution of food supplies is of great public benefit. Public patronage has given Kroger a large volume of sales and this enables Kroger to dispose of its merchandise more rapidly than if it were forced to obtain its profits from a higher price on a smaller volume. This rapid turnover assures the sale of fresh goods to the consuming public. In the food business this is particularly important and this method of conducting business has been of great value to the consuming public, because it prevents stale stock, stock wastage and stock spoilage.

[fol. 207] I have calculated the tax which Kroger would be required to pay under the gross sales tax previously referred to. This tax will average approximately Four Hundred and Thirty ($430) Dollars per store. If we only operated one store in Kentucky and this store had average sales of about Fifty Thousand ($50,000) Dollars, we would pay no tax because of the low rate of taxation and the credit granted for the payment of license fees. It is only because we own a number of stores and the requirement that each store should pay a tax return based not on the sales of that store but on the sales of all other stores aggregated that our tax amounts to $430 per store. In practical effect the law operates to prevent Kroger from operating a number of stores, solely because of their number. I say this because as a practical grocery man I know that it is impossible to successfully operate an average grocery store, if said store is required to pay a tax of $430 per store and all license fees and other taxes in addition thereto in competition with individual merchants and members of co-operative organizations, who do not pay any tax or only pay one-twentieth of the tax we are required to pay. A one (1%) per cent tax on gross sales will increase the operating expense of a Kroger store and of any well managed grocery store approximately five and one-half (5½%) per cent and no grocery

store can stand this increase in operating expense unless all competitors are subject to a substantially similar increase. It is impossible to shift this burden to the consumer by increasing the retail sale price of groceries, meats, milk, creamery and dairy supplies and garden and farm products for a number of reasons. Competitors who [fol. 208] are not subject to a like tax would be able to undersell us and the resulting loss of trade would make it impossible to operate successfully. Many standard brands are nationally advertised at definite prices and consumer demand for these items at these prices prevents any retailer from selling these nationally advertised brands at higher prices. Prices for numerous other items are fixed in world and national markets and cannot be arbitrarily regulated or controlled within state lines. In Kentucky there is considerable competition across state lines and higher prices cannot be obtained in Kentucky than competitive prices across the state line. For these reasons the tax cannot be shifted but would have to be absorbed by Kroger out of capital or earnings. At the present time, when a condition of economic depression exists, it would have to be paid largely out of capital, or we would be required to close or dispose of a sufficient number of stores to bring our tax within the minimum bracket. We are obligated to pay hundreds of thousands of dollars as rent under leases of stores having years to run and the enforcement of the gross sales tax against our company would inevitably result in an irreparable loss of hundreds of thousands of dollars arising from the inability of our company to continue its business in Kentucky except in a limited number of stores with sales aggregating not to exceed Four Hundred Thousand ($400,000) Dollars.

John B. Bonham.

[Duly verified.]

[fol. 209]

EXHIBIT "A"

I. G. A. Contract

THIS AGREEMENT entered into by the Wholesaler and Retailer, both of whose signatures are affixed hereto

WITNESSETH, THAT

WHEREAS, there exists a great need for closer co-operation between Wholesalers and Independent Retailers throughout the United States in order that both Wholesaler and Retailer may, through close co-operation, secure the many benefits of mass buying, mass merchandising and mass advertising, and in order that many needed economies in the operation of both the Wholesalers and Retailers business may be brought about so that Consumers trading with such Retailers may also in turn receive benefits, thus furthering community prosperity and growth and perpetuating the individually owned retail business, and

WHEREAS, the undersigned Wholesaler has secured a charter from the INDEPENDENT GROCERS' ALLIANCE OF AMERICA (I. G. A.) organized to make co-operation between the Wholesaler and Retailer possible and practicable, and providing a National Headquarters through which plans can be organized and carried into effect for the mutual benefit of the Wholesaler, Retailer and Consumer, and

WHEREAS, the undersigned Wholesaler and Retailer are both desirous of co-operating each with the other for the mutual benefits of both,

NOW, THEREFORE,

THE WHOLESALER WILL

First—Furnish the Retailer with the following advertising matter or other printed material as Headquarters of the I. G. A. from time to time may determine:

(A) 3 window posters per week.
(B) 250 copies of "STORE NEWS" every other week. Six times per year a special, larger edition of "STORE NEWS" to replace the regular issue.
(C) One large window placard each week.
(D) One window display bulletin with cut of display instructions for installation weekly.
(E) One merchandising bulletin monthly (inserted in GROCERGRAM).
(F) One copy of "I. G. A." GROCERGRAM monthly.
(G) Special advertising for use in clearance sale—
3 large window streamers
3 14 x 21 posters
3 10½ x 14 posters
(H) Special merchandising broadsides and bulletins for sales campaigns, etc.

It is understood that the Wholesaler is to have the privilege from time to time of making changes in the above advertising matter as the progress of the movement may make desirable in their judgment.

Second—Furnish a list of goods to be known as "Highly Competitive Items" which will be sold to Retailer by Wholesaler at Wholesaler's cost plus not to exceed 3% without regard to cash discount Wholesaler receives. Provided, however, that the total purchases of such items shall not exceed 25% of Retailer's total purchases from Wholesaler; exclusive of Fruits, Vegetables and Produce.

Third—Wholesaler to co-operate with Retailer on special remodeling and clearance sales.

Fourth—Wholesaler will provide a special supervisor at Wholesaler's Headquarters to co-operate with Retailer.

Fifth—Wholesaler to provide newspaper advertising for "I. G. A." members, newspaper advertising to start when 100 Retailers have signed agreements.

Sixth—Wholesaler will provide "I. G. A." Window Insignias for Retailer's use at cost of $1.25 for two.

Seventh—Procure for Retailer an official membership certificate in the INDEPENDENT GROCERS' ALLIANCE OF AMERICA.

THE RETAILER PROMISES AND AGREES

(A) To use in good faith to the best of his ability the service, insignias, emblems, etc., and expressly agree not to use or permit to be used in or about his store other emblems, insignias or advertising furnished from any other source unless agreed to by Wholesaler.
(B) 1. Paint store front of his store in I. G. A. colors.
2. Erect a sign with Retailer's name and "I. G. A." insignias thereon and affix "I. G. A." emblem transfers to windows.
3. Re-arrange and redecorate the interior of his store using I. G. A. Colors.
All as per "I. G. A." general and uniform plans relating to colors and store arrangements submitted by the Wholesaler to the Retailer. Retailer agrees to do all of this at his own expense.
(C) To pay Wholesaler THREE DOLLLARS AND FIFTY CENTS ($3.50) weekly, in advance, during the life of this agreement for the privilege of participating in the benefits provided for under this agreement.
(D) To pay all invoices on a weekly basis. These settlements to be made by Wednesday covering all purchases for previous week. Payments to be made on net basis on Fruits, Vegetables and Produce and on the agreed list of highly competitive Grocery items and less 2% Discount on the other Grocery items that are bought by the Wholesaler on a discount basis.
(E) To purchase goods from the Wholesaler to the total amount of not less than Five Hundred Dollars ($500.00) per month on Grocery items and Three Hundred and Fifty Dollars ($350.00) per month on Fruits, Vegetables and Produce during the life of this agreement.
(F) To keep his store in a clean and orderly condition and to repaint store and redecorate inside of store from time to time as the need becomes apparent. The outside to be painted at least once each year.

The term of this agreement is for a period of three years from date signed and it is expressly understood and agreed that should at any time the Wholesaler's charter from National I. G. A. Headquarters be terminated this agreement will be automatically cancelled without any liability to either party.

The Retailer hereinabove mentioned shall have the right of three year renewal periods from time to time at the expiration of the preceding three year period providing he lives up to this agreement and co-operates fully with the Wholesaler and carries out the promises and agreements hereinabove recited. The failure of either party to notify the other in writing within thirty days (30) prior to date of expiration of his desire to cancel will constitute a renewal for a three year period.

Retailer further agrees that in the event of the cancellation of this agreement by lapse of time or for other reasons that he will immediately repaint the front of his store so as to eliminate the "I. G. A." colors in order that the store will not mislead the public into believing it is an "I. G. A." store.

In the event that the Retailer either transfers his business or becomes bankrupt or fails to perform his part of this agreement, then and in that case, this agreement shall be deemed cancelled without any liability whatsoever by the Wholesaler to the Retailer and the Retailer agrees to return to the Wholesaler all insignias, signs, emblems, names and membership certificates, etc., and failing to do so, the Wholesaler shall have the right to enter and take possession for itself and its own use as it deems fit all "I. G. A." signs, names, insignias, membership certificates, etc., and shall have the right to withdraw and cease furnishing directly or indirectly all advertising material and service provided for under this contract, and in the event that the Retailer has defaulted in paying the weekly charge hereinabove specified to be paid during the life of this agreement, that said unpaid indebtedness to the date of cancellation shall become immediately due and payable.

The Retailer agrees further that inasmuch as the advertising material has to be ordered thirty days in advance, the Retailer agrees to pay the weekly charge hereinabove mentioned for four weeks after notice of cancellation.

This Agreement entered into at _____ this _____ day of _____ A. D. 19____, between the Wholesaler and Retailer both of whose signatures are affixed to this agreement.

_____
(Wholesaler)

_____ By _____
(Retailer)

[fol. 210] AFFIDAVIT OF W. A. STEIDEN

Louisville, Kentucky, December 30, 1930.

STATE OF KENTUCKY,
County of Jefferson, ss:

Mr. W. A. Steiden being first duly sworn says as follows:

I am 43 years of age and live with my family at Louisville, Kentucky. Ever since I have been in business I have been engaged in the grocery business. I was with Piggly Wiggly Valley Company beginning with 1917 in the capacity of General Manager and for the past two years and at present I have been in the employ of the Kroger Grocery and Baking Company and have been acting as Branch Manager for the Louisville Branch. As Branch Manager my duties consist of the general management, supervision, and control of 222 stores, the greater part of which are in the state of Kentucky. Our branch is divided into 14 districts. Districts 1 to 5 comprise the city of Louisville and they are under my direct supervision. District 6 is out of Jefferson, Hardin, Larue, Warren, and Nelson Counties. I visit the stores in these districts periodically. I check the sales made at each store. I keep the company advised of the progress and special needs of our stores. I also keep in close touch with the competitive conditions in regard to each of our stores and it is a part of my duties to inform the company in case I think it advisable to expand or to take new locations. It is a part of my duties to know something about competing stores. I have listed the Kroger stores in columns 1 and 2 on ex-
[fol. 211] hibit A. In column 3 I have listed a competing store which is operated either by an individual or a corporation who does not own any other store. In column 5, I have listed the affiliation of such store as well as I know the affiliation.

Because I am experienced in the retail grocery business and because of my familiarity with the location of the stores listed on exhibit A as competitors of the Kroger stores, I have estimated the annual sales of these competitive stores and have listed them in column 6 on exhibit A.

The average sales of each Kroger store is about $50,000.00. Each Kroger store competes with the grocery

store located in its neighborhood and it is not affected by grocery stores in other cities. The sales of many of the competitors exceed the sales of the Kroger store with which they compete. We have a Kroger store at 529 West Oak Street. John Hardy operates a grocery store in the same block. His store has sales which are estimated at $150,000.00 a year and this estimate is about three times as much as the sales of the Kroger store.

Grimms' Grocery located at 1482 South Seventh Street has gross sales which I estimate at $75,000.00. The Kroger store in the neighborhood is located at 1504 South Seventh. Its sales are around $35,000.00. I estimate that Ruffra Brothers at 1400 Hepburn Avenue does at least twice as much business as the Kroger store at 988 Barret which is only one block away. R. G. Eggen located at 1501 Winter Avenue is in the immediate vicinity and I estimate its sales as being larger than the sales of a competing Kroger store.

This situation is true in numerous cases in the districts over which I have supervision. In every case the Kroger Grocery and Baking Company and the stores operated by the competitors are similar. They sell the same general class of merchandise.

[fol. 212] The grocery business in the city of Louisville and in the state of Kentucky is hghly competitive. There are a great number of stores, and no individual or no corporation controls either the power of purchasing or the ability to sell to the public. Almost every grocery in my district has to pay license and special privilege taxes. There is a state tax for selling soft drinks. Almost all the groceries in my district sell soft drinks. The same is true of cigarettes and oleomargarine. These special privilege taxes run between $50.00 and $75.00 a store, and these taxes are alike for the Kroger stores and for the persons and corporations who operate a single store. The Kroger store, situated at 2549 W. Market Street, handles soft drinks, cigarettes, and oleomargarine. It pays a $6.00 license fee for the right to sell soft drinks, $11.00 for the privilege of selling cigarettes and the same amount in order to enable it to sell oleomargarine. The total tax is $28.00. Under the Gross Sales Act, this amount will be deducted from the tax which would have to be paid for that particular store. Mrs. B. Shulman's store, which is located at 25th and Griffith Avenue, is in direct competition with this

Kroger store. I estimate its annual sales at $50,000 and since the owner of this store has no other store, the tax would be 1/20th of 1% or about $25.00. Mrs. Shulman's Grocery store sells oleomargarine, cigarettes, and soft drinks. The deduction which it would be allowed to take would completely offset the tax which it would have to pay. This would not be so in the case of the Kroger store because the sales of the Kroger store are aggregated with the sales of all other Kroger stores in the state of Kentucky; thus placing Kroger in a higher bracket and subjecting it to a 1% tax. Inasmuch as Kroger has twelve million dollars' worth of sales in Kentucky, the tax on each store would be about $450.00, and when the deduction is taken off there would still remain a tax of about $425.00. [fol. 213] The effect of allowing deductions creates a similar result in the case of almost every other competitor who operates only a single store. A 1% tax, therefore, is placed on Kroger while no tax is placed on the competitors.

I have listed on exhibit D, the Kroger stores in districts 1 to 7, together with special license taxes which each store has to pay. These taxes are the same for competitors who handle the same products. Almost all the stores operated by competitors, who do not operate any other stores, are in the lower brackets, and because of the credits allowed them, will have no taxes to pay.

The profits which we endeavor to make from store operation in the Branch over which I supervise, do not average over 1½ to 2% on gross sales, but we are not able to make this profit at all times and a number of stores in my district have been operated at a loss for the last two years. The tax, therefore, would take about one half our profit and would frequently turn our profit into a loss or else increase the loss sustained from store operations. A tax of $425.00 per store is oppressive and prohibitive. It is practically impossible to operate any store at a profit and pay a $400.00 tax per store. It would be impossible to increase business because the entire profit on the increase would be taken up by the 1% tax. It would be impossible to open any new stores because the 1% tax has wiped out any margin of profit which we might have. However, competitors who operate a single store could increase their business or open new stores without subjecting themselves to any tax, or else they could

undersell us without paying any tax on the business which they take away from us. Many of the stores which we operate are under long term leases, and the closing of these stores would involve heavy losses.

[fol. 214] Many of the competitive stores, although individually owned, are now members of a cooperative association. In my district the following cooperative associations are operating, to wit:

Ohio Valley Grocery Company.

James Grocery Company.

Merchants Wholesale Grocery Company.

National Grocery Company.

I have listed on exhibit A column 5, the groceries that I think belong to cooperative associations. There are many on the list that I have marked as independents when they are really associated with some cooperative society. I believe that the Ohio Valley Grocery Company does about a million dollars worth of business a year. If each member of the Ohio Valley Grocery Company would be required to pay the same tax as Kroger does, its tax would be much higher than it is under the Kentucky Gross Sales Tax as passed. However, the state does not aggregate the sales of the cooperative association and as a result the members pay nothing. On the other hand the sales in all the Kroger stores are aggregated and each store has to pay the amount levied in the highest bracket. The members of the cooperative association enjoy all the advantages enjoyed by the Kroger stores. There is group buying and mass merchandising. This situation is the same in the case of the other cooperatives.

In the Kroger organization each store is a separate unit under its own manager. Separate records are kept for each store. Each store is charged with taxes which are assessed and the rent which must be paid. Each store is charged for goods purchased by that store and credited with sales made.

W. A. Steiden.

Sworn to before me this 13th day of January 1931. Ernest J. Wiley, Notary Public of Jeff. County, Kentucky. My commission expires June 15, 1933. (Seal of Ernest J. Wiley, Notary Public, Jefferson Co., Ky. My commission expires June 15, 1933.)

[fol. 215]

EXHIBIT "A"

Kroger Stores, District #1

Principal Independent Competitors

City	Street No.	Firm name	Address	Affiliation	Estimated annual sales
689	1280 Bards'tn Rd.	Major Taylor	1304 Bardstown Rd.	Ind.	$250,000
1038	St. Matthews, Ky.	Bauer Bros.	St. Matthews	Ind.	78,000
		Robbie & Clemens	" "	Ind.	75,000
		Fisher Bros.	" "	Ind.	16,000
1638	603 E. Walnut	Jas. Hess. Groc.	Clay & Chestnut	Ind.	13,000
		Country Store	Clay & Walnut	Ind.	10,000
		Berlins Grocery	623 E. Walnut	Ind.	8,000
		Ackermans Grocery	Hancock & Fehr	Ind.	26,000
		Wm. E. Mueller	Clay & Walnut	Ind.	10,000
1669	1609 Eastern Pky.	Crawford Groc.	Newburg Road	Ind.	13,000
1871	3300 Frankfort Ave.	Aug Niehaus	Shelbyville Rd.	Ind.	21,000
		C. E. Fry	Cannons Lane Frankft. Ave.	Ind.	50,000
2116	2337 Frankfort Ave.	H. Sohns	2218 Payne St.	Ind.	16,000
		Geo. Oeswien	2216 Frankfort Ave.	Ind.	30,000
		Ed. Eppinger	2257 Frankfort Ave.	Ind.	21,000
		Eiths Market	2269 Frankfort Ave.	Ind.	75,000
2533	2728 Frankfort Ave.	Hudson Market	2720 Frankfort Ave.	Ohio Valley	125,000
		F. C. Schuepbach	2708 Frankfort Ave.	Ind.	26,000
2896	2532 Frankfort Ave.	F. C. Schuepbach	2708 Frankfort Ave.	Merchant Gro. Co.	26,000
3067	1758 Frankfort Ave.	Greens Grocery	1813 Frankfort Ave.	Ind.	10,000
		V. Schmidt	Frankfort & Williams	Ind.	26,000
3157	975 Baxter Ave.	Otte Bros.	630 Baxter Ave.	Ind.	21,000
		Urma Cash Store	Rubel & Breckeridge	Ind.	13,000
		Schoffenberg Bros.	916 Baxter Ave.	Ind.	57,000
		Herbergers Market	1085 Bardstown Rd.	Ind.	36,000
3165	1381 Bardstown Rd.	Ralston Grocery	Bardstown Rd. & Edenside	Ohio Valley	250,000
		Cherokee Grocery	1379 Bardstown Rd.	Ohio Valley	150,000
3215	744 E. Broadway	R. O. Broder	Clay & Gray	Ind.	42,000
		Louis Haefflich	Clay & Gray	Ind.	16,000

		F. A. Curren	800 So. Shelby	Ind	13,000
		Wm. Kelkoff	Shelby & Roselane	Ind	36,000
		H. Dueselkamp	Shelby & Gray	Ind	13,000
		Rogues Market	715 E. Broadway	Ind	36,000
3489	1200 Bardstown Rd	Eggen Grocery	Winter & Edward	Ind	100,000
4399	1882 Frankfort	B. J. Blake	2004 Frankfort Ave	Ind	21,000
		East End Market	2025 " "	Ind	36,000
		P. Knoff & Sons	Frankfort & Vernon	Ind	75,000
4648	1603 Bardstown Rd	Deer Park Grocery	Deer Park & Bardstown Rd	Ind	50,000
[fol. 216]					
5009	St. Mathews, Ky	Bauer Bros	St. Matthews, Ky	Ind	78,000
		Robbie & Clemens	" " "	Ind	75,000
		Fisher Bros	" " "	Ind	16,000
5137	2912 Frankfort	Herman Potts	Stiltz Lane	Ind	31,000

[fol. 217]

Kroger Stores District #2

691	1038 So. 32nd St	Walter Grant	3036 Grant Ave	Do Not Know	$13,000.00
698	306 Woodlawn	Ice & Violett	546 Woodlawn	Ind	50,000.00
		Fallon Mkt	216 Woodlawn	Ind	31,000.00
786	2757 Dumesnil St	J. Irvin	2222 Dumesnil	Ind	13,000.00
1777	2127 W. Kentucky St	Geo. Evers	20th & Maple Sts	Ind	39,000.00
		Andersons Market	23rd & Maple	Ind	26,000.00
		Leo Messmer	23rd & Ky. Sts	Ind	31,000.00
		J. M. Yewell	2317 Garland	Ind	31,000.00
		B. Markowitz	23rd & Ky. Sts	Ind	31,000.00
		W. P. Todd	2100 W. Date St	Ind	21,000.00
		Geo. Kuhn	2339 W. Date St	Ind	21,000.00
		A. A. Grant	1107 S. 22nd St	Ind	23,000.00
		Wm. Yutz	2200 W. Maple	Ind	26,000.00
		David Hoffman	2202 Garland Ave	Ind	21,000.00
2298	2200 W. Oak St	Geo. Scott	1219 So. 18th St	Ind	18,000.00
		Eckerles Grocery	2301 Wilson St	Ind	31,000.00
		Allen & Moore	2201 W. Oak St	Ind	75,000.00
		Grines Grocery	2184 Dumesnil	Ind	13,000.00
		S. W. Brock	2100 Wilson St	Ind	16,000.00
		Allen Grocery	1828 W. Ormsby	Ind	16,000.00

EXHIBIT "A"—Continued

City	Street No.	Firm name	Address	Affiliation	Estimated annual sales
		R. L. Crossier	2225 W. Ormsby	Ind	$16,000.00
		E. Scott	2100 St. Louis Ave	Ind	32,000.00
2930	4600 So. 6th St				
3154	3032 So. 4th St	H. J. Roberts	762 So. Central	Ind	13,000.00
		Wm. Schwacter	3000 So. 3rd St	Ind	42,000.00
		Harrisons Mkt	3028 So. 4th St	Ind	18,000.00
		South Lou. Mkt	3018 So. 4th St	Ind	39,000.00
		Sam. Krietmon	3115 So. 4th St	Ind	25,000.00
4292	4508 Park Blvd	H. Marcell	4532 Park Blvd	Ind	31,000.00
		Len Wilson	4621 Park Blvd	Ind	31,000.00
		C. Fisk	4412 Lou. Ave	Ind	18,000.00
		W. Lippold	4701 Lou. Ave	Ind	20,000.00
		Beisler Bros	4358 Park Blvd	Ind	31,500.00
		J. W. Thomas	4346 Park Blvd	Ind	15,000.00
4474	2533 Greenwood	V. L. Dunn	26th & Howard	Ind	13,000.00
		A. McDowell	1028 So. 26th St	Ind	21,000.00
		R. Grenwell	25th & Osage	Ind	23,000.00
[fol. 218]		G. P. Stammell	1232 So. 26th St	Ind	48,000.00
4477	3102 Taylor Blvd	J. F. Jarosh	3331 Taylor Blvd	Ind	21,000.00
		Jetton & Son	Taylor & Central	Ind	31,000.00
		Frank Hartman	3296 Taylor Blvd	Ind	26,000.00
4484	3131 Virginia Ave				
4491	2830 So. 4th St	Chas. E. Toffe	521 Winkler	Ind	36,000.00
		A. J. Schmitt	2700 So. 4th St	Ind	36,000.00
		Ben Rosenblum	2732 So. 4th St	Ind	21,000.00
		Moorehead Grocery	2818 So. 4th St	Ind	15,000.00
		E. E. Linder	2901 So. 4th St	Ind	18,000.00
		E. P. Buchort	2932 So. 5th St	Ind	16,500.00
		S. O. Nichols	2723 So. 7th St	Ind	16,500.00
		E. E. Houseman	2918 So. 7th St	Ind	13,000.00
4493	3465 Taylor Blvd	Bessie Creason	4400 Taylor Blvd	Ind	26,000.00
		Geo. Slacter	3700 Taylor Blvd	Ind	26,000.00

		Wm. Betz	3469 Taylor Blvd	Ind	42,000.00
		T. Walker	423 Taylor Blvd	Ind	26,000.00
		J. C. Becker	1400 Berry Blvd	Ind	31,000.00
		C. E. Seifer	1416 Berry Blvd	Ind	28,000.00
		J. Ottersbach	4000 Taylor Blvd	Ind	5,000.00
		Greenerts Mkt	3800 Taylor Blvd	Ind	26,000.00
4639	1400 Hemlock	Millers Groc	3030 Southern Ave	Ind	28,000.00
		William Downs	3216 Kirby	Ind	31,000.00
		A. V. Terrill	32nd & Woodland	Ind	31,000.00
4764	1101 So. 18th St	J. A. Olt	18th & Garland	Ind	21,000.00
		Bills Mkt	18th & Oak St	Ind	16,000.00
		R. A. Warren	18th & Maple	Ind	31,000.00
:5151	1507 So. 18th St	H. Torstick	23 & Hill St	Ind	39,000.00
		Fust Grocery	1442 So. 18th St	"	52,000.00
		T. P. Kolbrier	1329 So. 18th St	"	78,000.00
		E. C. Schoff	1359 So. 18th St	"	21,000.00
		C. L. Misbach	18th & Hill	"	28,000.00
		Geo. Schneider	2339 Bolling Ave	"	15,00.000
		J. M. Rose	18th & Burnett	Ind	13,000.00
5159	3781 So. Parkway	Vaughns Mkt	3946 So. 3rd St	Ind	23,000.00
		J. G. Schuster	3758 So. 3rd St	"	26,000.00
		C. C. Cocke, Jr	3947 So. 4th St	"	18,000.00
		G. H. Buffett	4101 So. 3rd St	"	21,000.00

[fol. 219]

Kroger Stores, District #3

430	1606 Bardstown Rd	Deer Park Groc. Co	1759 Bardstown Rd	Ind	50,000.00
		J. John	1700 Bonnycastle	Ind	31,000.00
659	988 Barrett	Arch E. Eggen	1501 Winter Ave	Ind	75,000.00
		Ruffra Bros	1400 Hepburn Ave	Ind	100,000.00
1491	2042 Preston	Jno. Beckman	2039 So. Shelby	Ind	21,000.00
		Ising Bros	2205 So. Preston St	Ind	60,000.00
1648	2733 Bardstown Rd				
2430	2451 Bardstown Rd	Mike Schum	2301 Taylorsville Rd	Ind	46,000.00
		Herman Kerz	2307 Taylorsville Rd	Ind	46,000.00
		Chas. Deckel	2443 Bardstown Rd	Ind	300,000.00
2498	1101 Goss Ave	John Harstern	1357 So. Shelby	Ind	62,500.00
		F. A. Greishaber	1148 So. Shelby	Ind	260,000.00

EXHIBIT "A"—Continued

City	Street No.	Firm name	Address	Affiliation	Estimated annual sales
2785	2227 Bardstown Rd	Chas. Deckel	2443 Bardstown Rd	Ind	300,000.00
		Mike Schum	2301 Taylorsville Rd	Ind	46,500.00
		Herman Kerz	2307 Taylorsville Rd	Ind	46,500.00
2954	1613 Norris Place	J. John	1700 Bonnycastle	Ind	30,000.00
3102	3131 Preston St	Jno. T. Echsner	2511 Preston St	Ind	36,000.00
		A. Ohlman	2901 " "	Ind	21,000.00
3397	1236 So. Shelby	Joe Meinart	Clay & St. Cath St	Ind	46,000.00
		Herman Pool	Logan & St. Cath	Ind	21,000.00
		J. A. Horton	1234 So. Shelby	Ind	28,000.00
		Jno. Hartstern	1357 So. Shelby	Ind	62,000.00
		Chris. Hartstern	1345 So. Shelby	Ind	26,000.00
		F. A. Greishaber	1148 So. Shelby	Ind	26,000.00
		Wm. Dreslane	701 Camp St	Ind	32,000.00
		Edw. Hanks	640 Camp St	Ind	21,000.00
		J. Schook Groc	1100 Ramers	Ind	46,000.00
3594	1908 Bardstown Rd	Adolph Hobbick	1868 Bardstown Rd	Ind	40,000.00
		Deer Park Gro. Co	Bardstown & Deer Park	Ind	50,000.00
4411	1933 So. 3rd St	H. G. Brooks & Co	1800 3rd St	Ind	400,000.00
		H. W. Stein	324 West Brandies	Ind	60,000.00
4490	901 Barrett	Wm. Strohm	918 Barrett	Ind	200,000.00
4799	1038 E. Burnett St				
5146	1512 Bardstown Rd	Heckman Groc. Co	1514 Bardstown Rd	Do Not Know	62,000.00
5164	801 Eastern Pkwy	Ising Bros	2205 So. Preston St	Ind	60,000.00
5550	963 Chas. St	Jake Hillman	Chas. & Kriger	Ind	60,000.00
		Stoll Grocery Co	1100 Milton	Ind	21,000.00
[fol. 220]		Kroger Stores, District #4			
384	528 So. 5th St	Snyders Grocery	562 So. 5th St	Ind	10,000.00
429	224 So. 4th St	Denunzios	345 W. Jefferson	Ind	52,000.00
452	1039 So. Brook	Scheffers Grocery	Brook & Caldwell	Ind	16,000.00
		Church's Grocery	Floyd & St. Catherine	Ind	16,000.00
		J. H. Kneady	Preston & St. Catherine	Ind	16,000.00
504	529 W. Oak St	Bass Market	7th & Oak St	Ind	21,000.00
		Shaikun's Grocery	7th & Zane St	Ind	18,000.00

		Moriarity Bros.	6th & Ky. St.	Ind.	60,000.00
		I. Kreitman	6th & Zane	Ind.	19,000.00
		Hardy Gro. Co.	5th & Oak	Ohio Valley Gro.	150,000.00
		W. O. Englander	7th & Ky. St.	" " "	32,000.00
1241	1159 So. 4th St.	H. Nuffer & Son	625 Magnolia	Ind.	50,000.00
1418	1271 So. Floyd St.	A. Hankie	Clay & Camp	Ind.	21,000.00
		R. A. Drislane	Clay & Camp	"	40,000.00
		G. A. Schneider	429 W. Ormsby	"	21,000.00
		J. W. Watson	Hancock & Camp	"	17,500.00
2439	978 So. 2nd St.	H. Franks	6th & Breck	Ind.	20,000.00
2612	1504 So. 7th St.	Danner Bros.	1505 So. 7th St.	Ind.	50,000.00
		Wm. E. Chick	7th & Shipp	Ind.	25,000.00
		S. Kellmann	1000 W. Hill	Ind.	15,000.00
		J. Adams	1100 W. Hill	Ind.	11,000.00
		M. D. Guelda	7th at 9th St.	Ind.	40,000.00
		M. Taylor	1116 W. Hill	"	10,500.00
		Louis Linker	1041 W. Hill	"	11,000.00
		Grimms Grocery	1462 So. 7th St.	"	75,000.00
		N. Wolders	1480 So. 7th St.	"	40,000.00
2787	1162 So. 3rd St.	H. G. Brooks & Son	3rd & Bloom	Ohio Valley	400,000.00
2841	654 So. 4th St.	Zapp's Groc. Co.	640 So. 4th St.	" "	100,000.00
2898	1527 So. 4th St.	C. W. Hall	5th & Lee	Ind.	20,000.00
		A. Hannish	5th & Lee	"	20,000.00
		W. Weinda	1454 So. 7th	"	15,000.00
3394	344 E. Oak St.	I. Farb	Preston & Oak St.	Ind.	16,000.00
		French's Gro.	Jackson & Oak St.	Ind.	25,000.00
		A. Schad	" "	Ind.	27,500.00
		Shelby Parkway Gro.	Preston & Shelby	Ind.	20,000.00
3414	861 So. 3rd St.	Wilkens Mkt.	5th & Breck	Ind.	24,000.00
		J. B. Strauss	4th & Broadway	Ohio Valley	350,000.00
3512	1501 So. 1st.	F. C. Slange	114 W. Hill St	Ind.	21,000.00
[fol. 221]					
3512	1501 So. 1st.	A. Anna Doll	238 E. Burnett	Ind.	15,000.00
4351	1398 So. 2nd	C. A. Young	2nd & Magnolia	Ohio Valley	250,000.00
5144	900 So. 1st				
5166	1201 So. 1st.	E. A. Altmans	2nd & Oak	Independent	15,000.00

[fol. 222]

EXHIBIT "A"—Continued
Kroger Stores, District #5

City	Street No.	Firm name	Address	Affiliation	Estimated annual sales
235	3405 W. Bdwy	Geo Numurer	35 & Michigan	Ind	13,000.00
		Abe Linker	31 & Bdwy	"	18,000.00
		Shawnee Gro. Co	34 & River Pk. Drive	"	47,000.00
		Hohman & Sons	34 & Bdwy	"	61,000.00
		Ruben Gro. Co	35 & Vermont	"	39,000.00
		W. G. Goings	30th & Michigan	"	10,000.00
		Robert & Back	30th & River Pk. Dr	"	10,000.00
		N. J. Osborne	30th & Michigan	"	10,000.00
785	2525 Portland Ave	Thos. McShane	25th & Ryan	"	20,000.00
		M. A. Carbone	23rd & Lytle	"	13,000.00
		Geo. Meyer	26th & Slevin	"	17,000.00
		Buechler & Fehrebach	26th & Elliott	"	13,000.00
		J. J. Logan	28th & Montgomery	"	16,000.00
		C. A. Buttler	21 & Portland	"	26,000.00
		Abe Keller	21 & Protland	"	16,000.00
		Willard Feller	26 & Portland	"	13,000.00
		John Von Allmen	25 & Portland	"	16,000.00
		Schulman Grocery Co	25th & Griffith	"	51,000.00
1401	4615 W. Mkt	G. E. Becker	41 & Market	"	60,000.00
		Hofsteter & Gunthner	42 & Market St	"	75,000.00
1455	2733 W. Bdway	Harry Davis	22 & Walnut	"	16,000.00
		Lewis Lechner	22 & Chestnut	"	21,000.00
1557	3321 W. Market	R. E. Haynes & Son	30th & Market	"	36,000.00
		Wm. Coch	29th & Market	"	18,000.00
		Henry Schock	227 N. 34th St	"	12,000.00
		Paul Muething	33rd & Rudd	"	10,000.00
		John Pontrich	34 & Market	"	52,000.00
		Guy Thurman	29th & Slevin	"	18,000.00
1696	3919 River Pk. Dr	Chas. Army	38th & River Pk. Dr	"	26,000.00
		Geo. Stevens Gro	37th & Vermont	"	10,000.00
1768	4034 W. Market	Frank Fust	41 & Cedar	"	17,000.00
		Hofsteter & Gunthner	43 & Market	"	75,000.00
		Chas. Regee	41 & Cedar	"	16,000.00

2363	2300 W. Market	Hohman & Son	24th & Jeff	"	52,000.00
		K. W. Spalding	22nd & Jeff	"	13,000.00
		J. Kopph, Jr	22nd & Market	"	10,000.00
		Joe Spelmiller	20th & Rowan St.	"	13,000.00
		J. W. Oldeges	24th & Rowand St.	"	13,000.00
[fol. 223]					
2363	2300 W. Market St.	Nicholas Wagner	23 & Duncan St.	Ind	13,000.00
		Geo. Killerman	22 & Market St.	"	23,000.00
		C. Rusch	21 & Market St.	"	31,000.00
		Miller Bros.	19 & Duncan	"	76,000.00
		Ollie Thorp	20th & Duncan	"	13,000.00
2917	3719 W. Bdwy	V. H. Durbin	Cecil & Chestnut	"	60,000.00
		Frank Fust	41 & Cedar	"	31,000.00
2921	3801 River Pk. Dr.	Orthobee Gro. Co.	34th & Cedar	"	30,000.00
		Ruben Gro. Co	35th & Vermont	"	39,000.00
		A. E. Boldsmith	38th & Vermont	"	21,000.00
		Chas. Army	38th & River Pk. Dr.	"	26,000.00
		Geo. Stevens Co.	37th & Vermont	"	10,000.00
3140	4321 Vermont	A. E. Goldsmith	38th & Vermont	"	21,000.00
		Chas. Regee	41 & Cedar St.	"	16,000.00
		G. E. Beker	41*th* & Market St.	Ohio Valley	44,000.00
		Hofstater & Gunthner	42nd & Market	Retail Merchants	75,000.00
		Frank Fust	41*th* & Cedar St.	James Gro. Co	17,000.00
4090	4311 W. Market	G. E. Beker	44th & Market	Ohio Valley	60,000.00
		Frank Fust	41*th* & Cedar	James Gro. Co.	17,000.00
		Hofsteter & Gunthner	42nd & Market	Retail Merchants	75,000.00
4381	4001 W. Bdway	A. E. Goldsmith	38th & Vermont	Ind	21,000.00
		Chas. Army	38th & River Pk. Dr.	"	26,000.00
		Geo. Stevens	37th & Vermont	"	10,000.00
		Ruben Gro. Co.	35th & Vermont	"	39,000.00
		V. H. Durbin	Cecil & Chestnut	"	60,000.00
4475	558 So. 20th St.	Sam Miller	20th & Cedar	"	13,000.00
		Geo. Gazel	20th & Madison	"	13,000.00
		Fred Miller	22nd & Mag	"	18,000.00
		W. T. Vaughan	19th & Chestnut	"	16,000.00
		J. C. Tuk	23 & Cedar St.	"	23,000.00
		B. R. Shera	22 & Magazine St.	"	13,000.00

EXHIBIT "A"—Continued

City	Street No.	Firm name	Address	Affiliation	Estimated annual sales
		M. L. Cohn	19th & Madison St	"	13,000.00
		Sm. Selman	20th & Magazine St	"	10,000.00
		J. S. McCown	21 & Cedar St	"	10,000.00
		J. C. Schuchard	21 & Walnut St	"	10,000.00
		Charley's Market	20th & Walnut St	"	29,000.00
		Geo. Minrath	20th & Jeff St	"	17,000.00
		Fred. J. Voll	22nd & Cedar	"	16,000.00
[fcl. 224]					
4479	2549 W. Market	M. H. Colman	27th & Market	Ind	21,000.00
		Mrs. B. Shulman	25th & Griffith	"	50,000.00
		Litchfield Gro. Co	26th & Main St	"	34,000.00
		Tony Litchfield	28th & Market	"	47,000.00
		Dan Weber	26th & St. Cecelia	"	18,000.00
		McDonald & Stevens	25th & St. Cecelia	"	23,000.00
		Fred Shanks	26th & Rowan	"	16,000.00
		G. H. Gunthner	26th & Jeff	"	23,000.00
		Marvin Shelburn	28th & Griffith	"	10,000.00
		J. W. Pruitt	26th & Jeff	"	10,000.00
		Jas. Schmidt	28th & Duncan	"	18,000.00
4620	2533 W. Walnut	M. Blier	24th & Walnut St	"	10,000.00
		Agnew Gro. Co	26th & Cedar	"	16,000.00
		Dan Hodge	26th & Madison	"	[illegible]00.00
		Schnepp Gro. Co	28th & Madison	"	47,000.00
		Monarch Gro. Co	27th & Chestnut	"	42,000.00
		H. Waith	28th & Jeff	"	23,000.00
		D. H. Cater & Sons	24th & Chestnut	"	26,000.00
		Harry Davis	25th & Walnut St	"	16,000.00
		Jos. Murkel	28th & Chestnut St	"	13,000.00
		D. Perilles	26th & Walnut	"	13,000.00
		Geo. Dillman	26th & Mag	"	13,000.00
4622	2839 Portland	J. W. Smith	1801 W. Pkway	"	18,000.00
		Phillyss Gro. Co	30th & Portland	"	17,000.00
		Sam Plank	29th & Baks St	"	16,000.00

		Geo. Beker	35th & Duncan	"		12,000.00
		Jos. C. Beker	34th & W. Pkway	"		60,000.00
		S. Davis	29th & Portland	"		60,000.00
		Jas. Zieser	37th & W. Pkway	"		40,000.00
		Mrs. B. Schulman	25th & Griffith	"		47,000.00
		Fred Davis	31 & Bank St	"		26,000.00
		Nick Weisenberg	34th & Bank St	"		13,000.00

[fol. 225]

Kroger Stores, District #6

1579	Elizabethtown, Ky	Walker & Miller	Elizabethtown, Ky	Independent		51,000.00
		Hawkins Grocery	"	"		52,000.00
		Clarks Home Grocery	"	"		52,000.00
		Adams Grocery	"	"		31,000.00
		Williams Grocery	"	"		23,000.00
		Joe Kirk	"	"		13,000.00
		L. H. Lee	"	"		13,000.00
2206	Bowling Green, Ky	J. C. Brownfield	1305 Center St. B. G. Ky.	"		52,000.00
		H. Willoughby	729 College St. " " "	"		31,000.00
4796	Bardstown, Ky	J. S. Smith	3rd Street. Bardstown, Ky	"		47,000.00
		Bardstown Grocery	3rd Street, "	"		73,000.00
		Rapier Grocery	" "	"		42,000.00
		Ballard & Ballard	" "	"		31,000.00
		Stoker & Smith	" "	"		36,000.00
5248	415 Park Row B. G. Ky.	S. Brown	12th & Adams St. B. G. Ky.	Retail Merch. Asso		52,000.00
		A. Gunnels	702 College St. " " "	" " "		42,000.00
		Chas. James	504 12th St. " " "	"		62,000.00
		Thomas Bros	210 Main St. " " "	"		78,000.00
		J. S. Cole	423 College St. " " "	Ind		31,000.00
		R. S. Cole	1246 Netwood St. " " "	Ind		21,000.00
		Beete Dobson	116 High St. " " "	Ind		16,000.00
		Hubert Ducket	1207 Broadway " " "	Ind		26,000.00
		Urey Dennis	Church St. " " "	Ind		21,000.00
		P. Holland	1238 Indianola " " "	Ind		23,000.00
		J. W. Hogan	625 Church St. " " "	Ind		21,000.00
		Hudson Bros	401 W. Main St. " " "	Ind		16,000.00

EXHIBIT "A"—Continued

City	Street & No.	Firm name	Address	Affiliation	Estimated annual sales
		F. L. Kister	875 Broadway St. B. G. Ky	Ind	31,000.00
		E. McDonald	322 College St. " " "	Ind	42,000.00
		McCormick	206 Main St. " " "	Ind	52,000.00
		A. H. McFarland	3rd & College " " "	Ind	42,000.00
		Park & McGoodwin	945 State St. " " "	Ind	62,000.00
		Mrs. J. Moltenberry	Fairview Ave. " " "	Ind	39,000.00
		Robald Bros	140 Main St. " " "	Ind	57,000.00
		Jack Russell	928 State St. " " "	Ind	42,000.00
		Siddens	1265 College St. " " "	Ind	50,000.00
		Tabor Bros	724 Fairview " " "	Ind	42,000.00
[fol. 226]					
5248	415 Park Row B. G. Ky	P. E. Tandy	115 13th St. B. G. Ky	Independent	31,000.00
		H. H. Welch	418 13th St., " " "	"	39,000.00
L-2	Hodgenville, Ky	C. H. Duckworth	Hodgenville, Ky	Unknown	32,000.00
		M. C. Jolly	" "	"	31,000.00

EXHIBIT "B"
L-i-c-e-n-s-e
District #1

[fol. 227]

Store No.	Address	City soft drinks	County soft drinks	City cigarettes	County cigarettes	County Oleo	City Meat	Egg dealers	City grocery
689	1280 Bardstown Rd	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
1038	St. Matthews, Ky	.....	6.00	.....	11.00	11.00	.....	.....	....
1638	603 E. Walnut St	10.00	6.00	.....	.....	11.00	25.00	.....	....
1669	1609 Eastern Pkway	10.00	6.00	.....	.....	11.00	.....	.....	....
1871	3300 Frankfort Ave	10.00	6.00	10.00	11.00	11.00	.....	.....	....
2116	2337 Frankfort Ave	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
2533	2728 Frankfort Ave	10.00	6.00	.....	.....	11.00	25.00	.....	....
2896	2532 Frankfort Ave	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
3067	1758 Frankfort Ave	10.00	6.00	.....	.....	11.00	.....	.....	....
3157	975 Baxter Ave	10.00	6.00	.....	.....	11.00	25.00	.....	....

3165	1381 Bardstown Rd.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
3215	744 E. Broadway	10.00	6.00	10.00	11.00	11.00	.....	.....	....
3489	1200 Bardstown Rd.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
4399	1882 Frankfort Ave.	10.00	6.00	.....	.....	11.00	25.00	.....	....
4648	1603 Bardstown Rd.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
5009	St. Matthews, Ky.	.....	6.00	.....	11.00	11.00	.....	.....	....
5137	2912 Frankfort Ave.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
[fol. 228]				District #2					
691	1038 So. 32nd St.	10.00	6.00	.....	.....	11.00	.....	.....	....
698	306 Woodlawn Ave.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
786	2757 Dumesnil St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
1777	2127 W. Ky. St.	10.00	6.00	.....	.....	11.00	.....	.....	....
2298	2200 W. Oak St.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
2930	4600 S. Sixth St.	10.00	6.00	.....	.....	11.00	.....	.....	....
3154	3032 So. Fourth St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
4292	4508 Park Blvd.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4474	2533 Greenwood	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4477	3102 Taylor Blvd.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4484	3131 Virginia	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4491	2830 So. 4th St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4493	3467 Taylor Blvd.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4639	1400 Hemlock St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4764	1101 So. 18th St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
5151	1507 So. 18th St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
5159	3781 Sou. Pkwy	10.00	6.00	.....	.....	11.00	25.00	.....	....
[fol. 229]				District #3					
430	1606 Bardstown	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
659	988 Barrett Ave.	10.00	6.00	.....	.....	11.00	.....	.....	....
1491	2042 Preston St.	10.00	6.00	.....	.....	11.00	.....	.....	....
1648	2733 Bardstown	.....	6.00	.....	11.00	11.00	.....	.....	....
2430	2451 " Rd.	10.00	6.00	.....	.....	11.00	25.00	.....	....
2498	1101 Goss Ave.	10.00	6.00	.....	.....	11.00	25.00	.....	....
2785	2227 Bardstown Rd.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....

EXHIBIT "B"—Continued

Store No.	Address	City soft drinks	County soft drinks	City cigarettes	County cigarettes	County Oleo	City Meat	Egg Dealers	City grocery
2954	1613 Norris Place	10.00	6.00	.....	.....	11.00	.....	.....	....
3102	3131 Preston St.	.....	6.00	.....	.....	11.00	.....	.....	....
3397	1236 So. Shelby	10.00	6.00	.....	.....	11.00	25.00	.....	....
3594	1908 Bardstown Rd.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
4411	1933 So. Third St.	10.00	6.00	.....	.....	11.00	.....	.....	....
4490	901 Barrett Ave.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4799	1038 E. Burnett	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
5146	1521 Bardstown Rd.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
5164	801 Eastern Pkway	10.00	6.00	.....	.....	11.00	25.00	.....	....
5550	963 Charles St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
[fol. 230]				District #4					
384	528 S. Fifth St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
429	224 S. Fourth St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
452	1039 S. Brook St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
504	529 W. Oak St.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
1241	1159 S. Fourth St.	10.00	6.00	.....	.....	11.00	.....	.....	....
1418	1271 S. Floyd St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
2439	978 S. Second St.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
2612	1504 S. Seventh St.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
2787	1162 S. Third St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
2841	654 S. Fourth St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
2898	1527 S. Fourth St.	10.00	6.00	10.00	11.00	11.00	.....	.....	....
3394	344 E. Oak St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
3414	861 S. Third St.	10.00	6.00	.....	.....	11.00	.....	.....	....
3512	1501 S. First St.	10.00	6.00	.....	.....	11.00	.....	.....	....
4351	1398 S. Second St.	10.00	6.00	.....	.....	11.00	.....	.....	....
5144	900 S. First St.	10.00	6.00	.....	.....	11.00	.....	.....	....
5166	1201 S. First St.	10.00	6.00	.....	.....	11.00	.....	.....	....

[fol. 231]

District #5

235	3403 W. Broadway	10.00	6.00	.....	.....	11.00	.....	.....	....
785	2525 Portland Ave.	10.00	6.00	.....	.....	11.00	25.00	.....	....
1401	4615 W. Market St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
1455	2133 W. Broadway	10.00	6.00	.....	.....	11.00	.....	.....	....
1557	3321 W. Market St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
1696	3919 River Park Dr.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
1768	4034 W. Market St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
2363	2300 W. Market St.	10.00	6.00	.....	.....	11.00	25.00	.....	....
2917	3719 W. Broadway	10.00	6.00	.....	.....	11.00	25.00	.....	....
2921	3801 W. Chestnut	10.00	6.00	.....	.....	11.00	.....	.....	....
3140	4321 W. Madison	10.00	6.00	.....	.....	11.00	25.00	.....	....
4090	4311 W. Market St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4381	4001 W. Broadway	10.00	6.00	.....	.....	11.00	.....	.....	....
4475	588 S. 20th St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4479	2549 W. Market St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4620	2533 Walnut St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....
4622	2839 Portland Ave.	10.00	6.00	10.00	11.00	11.00	25.00	.....	....

[fol. 232]

District #6

1579	Public Square, Elizabethtown, Ky.	.....	6.00	25.00	11.00	11.00	.....	2.00	....
2206	935 College St., Bowling Green, Ky.	.....	6.00	.....	11.00	11.00	15.25	.....	15.25
4796	Third St., Bardstown, Ky.	25.00	6.00	25.00	11.00	11.00	.....	2.00	20.00
5248	415 Park Row, Bowling Green, Ky.	.....	6.00	.....	.....	11.00	15.25	2.00	15.25

The above represents all Kentucky stores in Districts 6, 7 and 8.

[fol. 233] AFFIDAVIT OF GILBERT J. SCHNEIDER

Lexington, Kentucky, December 30, 1930.

STATE OF KENTUCKY,
County of Fayette, ss:

Mr. Gilbert J. Schneider being first duly sworn says as follows:

I am 32 years of age and live with my family at Lexington, Kentucky. I have been employed by The Kroger Grocery & Baking Company for the last 16 years. I started with the Kroger organization as a store boy. Later I became a clerk in the store and then Store Manager. I acted as supervisor for 2½ years over district 12 working out of the Louisville Branch of The Kroger Grocery & Baking Company and for the last 15 months I have been Superintendent, having charge of districts 9, 10, 11, and 12.

As supervisor over district 12, I was thoroughly acquainted with the Kroger stores in the district and with the stores competing with Kroger. My duties as Superintendent consist of looking after sales, see that stores are stocked with the proper merchandise and keep in touch with what competitors in my territory are doing. In order to keep in close touch with what competitors are doing, I often have occasion to shop in their stores in order to determine prices they are charging and to get an idea what stock they carry and what business they are doing. Because of my duties and because of my familiarity with the locations of the stores competing with Kroger's, I am familiar with the retailing of groceries and meats in the counties of—

[fol. 234]

Fayette,	Marion,	Washington,
Pulaski,	Belle,	Boyd,
Whitley,	Lincoln,	Rock Castle,
Harlan,	Laurel,	Owen,
Mercer,	Franklin,	Carroll,
Shelby,	Henry,	Jessamine,
Garret,	Oldham,	Scott,
Montgomery,	Estill,	Madison,
Clark,	Bourbon,	Woodford.

I am acquainted with the number of grocery stores in my territory, the affiliations of the groceries, the character of the merchandise sold in the stores, the competitive condi-

tions in the counties, and the taxes to which the stores are subject, and I am able to estimate the approximate gross sales of the various stores located in the districts.

The Kroger Grocery & Baking Company owns and operates 63 stores in districts 9, 10, 11, and 12 located as shown in column 1 and 2 on exhibit A which is attached hereto. These stores compete directly with other grocery stores located in the same cities and towns and which are in the immediate vicinity of the Kroger stores. On exhibit A there is listed in column- 3 and 4 the principal competitor over each Kroger store over which I have supervision. In column 5, I have listed the affiliation of each store and in column 6 the estimated annual sales of each competitive store.

The average sales of each Kroger store in the territory over which I supervise, is approximately $50,000.00 a year or $1,000.00 a week.

The sales of the following stores owned by competitors who do not own or manage any other store exceed the gross sales of the Kroger store in that locality:

Kroger Store, Harlan, Ky., Gross sales approximately	$60,000.00
Competing Store, W. H. Pennington, Gross sales approximately	100,000.00
Kroger Store, Middlesboro, Ky., Gross sales approximately	65,000.00
Competing Store, Shoffner Gro. Co., Gross sales approximately	100,000.00
Kroger Store, Danville, Ky., Gross sales approximately	55,000.00
Competing Store, W. B. Martin, Gross sales approximately	90,000.00
Kro. Store, 641 E. Main, Lexington, Ky., Gross sales approximately	58,000.00
Competing Store, Clay & W. Main, Lex., Gross sales approximately	100,000.00

In every case the stores operated by the Kroger Grocery & Baking Co. and the stores operated by its competitors han- [fol. 235] dle a similar line of merchandise and deal with the same public. There is no monopoly in the grocery business in the state of Kentucky in the district under my supervision. There are a great number of stores in the field that is highly competitive. Each Kroger store over which I have charge is in direct competition with other stores in the immediate vicinity.

All of the stores under my supervision sell soft drinks, cigarettes, oleomargarine and some candle eggs. The license taxes which each Kroger Store pays are listed on exhibit B attached hereto. In each case the sum total of license taxes amounts to about $50.00. Almost all the stores competing with Kroger handle soft drinks, cigarettes, oleo-

margarine, and a great many of them candle eggs. Their license taxes would be about the same as the taxes which Kroger has to pay.

The average sales of competitive stores owned by individuals or corporations which do not own more than one store does not exceed $50,000.00 and a good many of them have sales around $25,000.00.

In Campbellsville, Kentucky, W. R. Hoskins does about $75,000.00 worth of business a year. Under the Gross Sales Tax law his sales would be taxed at 1/20th of 1% and this tax would amount to about $37.50. Hoskins' Grocery sells oleomargarine, cigarettes, and soft drinks. His deductable tax therefore would be the same as the deductable tax of the Kroger store at Campbellsville and would be about $50.00. As a result, the grocery operated by W. R. Hoskins would pay no tax. We operate a grocery in Campbellsville which is competing with Hoskins' store. It does about $40,000.00 worth of business. Although we have a right to the same deduction as Hoskins, we would still have to pay a tax because our sales are added to the sales of all Kroger stores in the state of Kentucky in order to determine the rate of taxes. As a result our store is subject to a 1% tax on its sales which would amount to about [fol. 236] $450.00 a year. After the deductions are made it still would have to pay $400.00 a year.

In Franklin County we operate a grocery store at 208 Main Street. We have another store at 211 St. Clair which is just around the corner. We operate a third store at 311 St. Clair which is within one and a half blocks of the other two stores. The Moore grocery is located in the same block. Each of our three stores does about $50,000.00. The Moore Grocery does the same amount of business a year. All four stores sell cigarettes, and oleomargarine. The tax on the Moore grocery would be $25.00 and it would be completely erased by the deductions which they are allowed to take. In regard to the three Kroger stores, however, the deduction would not relieve them from paying the tax but instead each store would be subject to the tax of about $400.00.

In the city of Lexington, Alex Hughes operates a grocery at the corner of Walnut and East Second Street. This store is one block from the Kroger store which I supervise and it competes directly with the Kroger store. The gross

sales in Alex Hughes' store is estimated about $60,000.00 a year. He would not be subject to any tax because of the deductions which he is allowed to take. Our store at 3rd and Walnut has a gross sales of about $21,000.00 or less than half the sales of Alex Hughes. However, our store would have to pay a tax of $400.00. The same situation exists in regard to every store over which I have supervision and in each case competitors who own no other stores do not pay any tax but the Kroger store is subjected to a tax of $400.00.

A $400.00 tax on each store is oppressive and prohibitive. Each store operates on a basis of a small margin of profit which is not over 1½ to 2% on gross sales. It is therefore practically impossible to operate any store at a profit and pay $400.00 tax per store. It would be impossible to increase business because the small margin on which the increased business would be done would be all eaten up by the [fol. 237] tax. Any new store opened up by Kroger in the territory under my supervision would be subject to the 1% tax on all of its sales. However, a competitor who operates only one store could increase his business or open up a new store without subjecting himself to any tax. Many stores are under long term leases and if they would be closed heavy losses would result. If this heavy tax is imposed, our competitors would be able to undersell us by approximately 1% but they would not have to pay any tax on the increased business which they would get as a result.

Many of the competitors of the Kroger stores under my supervision are now members of cooperative associations. I have listed the affiliation of these stores in column 5 of exhibit A.

Independent Grocers Alliance is an important voluntary cooperative association operating in the territory over which I have supervision. Independent Grocers Alliance has some stores outside of my district in the state of Kentucky. I believe that if the sales of each of the stores which are members of Independent Grocers Alliance would be aggregated the same as the sales of each Kroger store are aggregated with the sales of every store in the state, that those merchants would fall in the highest bracket and would have to pay a 1% tax. However, the members of cooperative associations pay nothing. In spite of this fact they enjoy the advantages which the stores owned by Kroger

have as a result of being members of the Kroger organization. They secure the benefits of mass buying, mass merchandising, mass advertising, and other economies.

Each member is furnished with window posters and literature in regard to the proper conduct of grocery business the same as Kroger stores are furnished from central headquarters. Special merchandise broadsides and bulletins for sales campaigns are sent to members of Independent Grocers Alliance by the central headquarters. Each member of Independent Grocers Alliance has common [fol. 238] newspaper advertising in the city of Lexington, that is, one advertising article is inserted for all Independent Grocers Alliance stores in the city of Lexington. There is attached, a marked exhibit C, copy of an advertisement that appeared in a Lexington newspaper by Independent Grocers Alliance. The store fronts of each member of Independent Grocers Alliance bear the insignia "I. G. A.". They have common store fronts and can be easily recognized as "I. G. A." stores. The central headquarters send special supervisors who cooperate with the retailer in assisting and developing of the business. These supervisors are experts who advise the retailers in regard to proper methods for increasing sales.

Under the Kentucky Sales Tax Statute, each member of the Independent Grocers Alliance is treated as a separate unit and is not forced to aggregate his sales with the other members of the association. As a result, his deductions relieve him from the payment of any tax. Every Kroger store is a separate unit under its own manager. Separate records are kept for each store. Each store is charged with taxes and rent, and with the goods which it purchases and credited with the sales it makes. However, the Kentucky Sales Tax Statute does not treat the Kroger stores as separate units but aggregate the sales of all the stores, thus subjecting each store to a 1% tax on its gross sales.

Gilbert J. Schneider.

Sworn to before me this 5th day of January, 1931. Roy Forman, Notary Public of Fayette County, Kentucky. Notary Public, Fayette Co., Ky. My Commission expires Aug. 20, 1931. (Seal Roy Forman, Notary Public, Fayette County, Ky.)

District No. 9

EXHIBIT "A"

KROGER STORES — PRINCIPAL INDEPENDENT COMPETITORS

Store No. CITY	STREET AND NO.	FIRM NAME	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
Lexington, Ky. #2130	509 E. Maxwell	R. T. Coons	High & Kentucky Sts.	Ind.	37,000.00
		J. L. Rue & Sons,	Woodland & Euclid Aves.	Ind.	80,000.00
2154	216 E. 7th St.	T. J. Burke	7th & Maple Ave.	Ind.	26,000.00
		F. L. Totten	746 Maple Ave.	Ind.	21,000.00
2185	934 S. Limestone	H. B. Heathman	Lime & Virginia Aves.	Ind.	36,500.00
2245	383 S. Broadway	Kelly-Hunt	Mill & Maxwell Sts.	Ind.	42,000.00
		Andrew B. Sallee	Broadway & High Sts.	Ind.	45,000.00
2522	148 N. Broadway,	Hart Brothers	316-18 W. Short St.	Ind.	95,000.00
		J. T. Mallory	474 N. Broadway	Ind.	50,000.00
2662	1190 N. Limestone	W. E. Allender	Bryan Station Pike	I.G.A.	30,000.00
2704	208 E. Third St.	J. A. Willis & Son	Third & Jefferson	Ind.	30,000.00
		C. L. Duvall	340 Race St.	Ind.	20,000.00
3060	500 E. Third St.	Holbrook Co.	501 E. Third St.	Ind.	25,000.00
		John McGarvey	561 W. Third St.	Ind.	25,000.00
3062	112 N. Hanover	Holman Gro. Co.	Cramer & Victory Ave.	I.G.A.	52,000.00
		J. T. Robertson	Cramer & Hanover Aves.	Ind.	30,000.00
		I. H. Gum	Walton & Cramer Ave.	Ind.	40,000.00
5226	Maxwell & Woodland	F. S. Johns	347 LaFayette Ave.	I.G.A	35,000.00
		Jack-Dodd	349 Clifton Ave.	Ind.	35,000.00
		Service Grocery Co.	Columbia & Rose Sts.	Ind.	30,000.00
5227	208 E. Main St.	None			
5228	145 N. Limestone	J. T. Looney	262 E. Short St.	Ind.	45,000.00
		Alex Hughes	Walnut & E. 2nd St.	Ind.	60,000.00
		Leslie Rue	5th & Walnut Sts.	Ind.	35,000.00
5232	852 E. High St.	Spicer Gro. Co.	High & Clay Sts.	I.G.A.	50,000.00
		Butler Gro. Co.	846 E. High St.	Ind.	30,000.00

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District No. 9 cont.

EXHIBIT "A"

KROGER STORES

PRINCIPAL INDEPENDENT COMPETITORS

Store No. City.	STREET & NO.	FIRM NAME	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
Lexington, Ky.					
5245	600 N. Limestone St.	S. Rosenberg	301 E. 5th St.	Ind.	35,000.00
		L. W. Rue	Fifth & Walnut Sts.	Ind.	30,000.00
5246	102 E. Maxwell	L. Woods	Limestone & Maxwell	I.G.A.	20,000.00
		Warren Brothers	201-203 S. Limestone	Ind.	80,000.00
		W. B. Griggs	563 S. Limestone	Ind.	50,000.00

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District No. 10

[101.241]

District No. 10

KROGER STORES

EXHIBIT "A"

PRINCIPAL INDEPENDENT COMPETITORS

CITY Store No.	STREET & NO.	FIRM NAME	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
703	Owingsville, Ky.	Estill & Thomas	Owingsville, Ky.	Ind.	75,000.00
		Ray Spencer	Owingsville, Ky.	Ind.	35,000.00
861	Paris, Ky	Cook Gro. Co.	Paris, Ky.	Ind.	75,000.00
2537	Paris, Ky.	J. W. Brone	Paris, Ky.	I.G.A.	40,000.00
5206	Paris, Ky.	Chas. Green	Paris, Ky.	Ind	21,000.00
946	Winchester, Ky.	H. O. Ro Gro. Co.	Winchester, Ky.	Ind.	75,000.00
2086	Winchester, Ky.	Smith Gro. Co.	Winchester, Ky.	Ind.	30,000.00
5240	Winchester, Ky.	R. B. Brown	Winchester, Ky.	Ind.	35,000.00
1708	Mt. Sterling, Ky.	T. K. Barnes	Mt. Sterling, Ky.	I.G.A.	28,000.00
		H. B. Ringo	Mt. Sterling, Ky.	Ind.	28,000.00
		W. O. Mackie	Mt. Sterling, Ky.	Ind.	18,000.00
3254	Richmond, Ky.	Joe Groc. Co.	Richmond, Ky.	Ind.	50,000.00
		Ora Hachett	Richmond, Ky.	Ind.	45,000.00
		Home Groc. Co.	Richmond, Ky.	Home Gro.Co. Lexington,Ky.	45,000.00
		Kinkead Grocery	Richmond, Ky.	Ind.	21,000.00
3369	Irvine, Ky.	Broadway Gro. Co.	Irvine, Ky.	Ind.	50,000.00
		Wilson Grocery	Irvine, Ky.	Ind.	30,000.00
3417	Georgetown, Ky.	M. C. Cash Grocery	Georgetown, Ky.	Ind.	42,000.00
5222	Georgetown, Ky.	Morris & Crenshaw	Georgetown, Ky.	Ind.	50,000.00
		Floyed Robinson	Georgetown, Ky.	Ind.	40,000.00
5225	Short & B'way, Lexington, Ky.	H. B. Royse	586 W. Main, Lexington, Ky.	Ind.	55,000.00
		J. B. Wallace	592 W. Main, Lexington, Ky.	Ind.	45,000.00
		Sharkeys Groc.	752 W. Main, Lexington, Ky.	Ind.	30,000.00
5229	641 E. Main, Lexington, Ky.	L. F. Rue Groc.	Main & Clay Sts.,Lexington,Ky.	Ind.	100,000.00
5231	1035 S. Limestone,Lexington,Ky.	None			
2660	521 Georgetown St.Lexington, Ky.	B. N. Foley	535 Georgetown St.Lexington,Ky .	Ind.	40,000.00
		Roy Gaines	4th & Georgetown, Lexington, Ky.	I.G.A.	75,000.00
		Robertson Gro.	383 Georgetown St.,Lexington, Ky.	Ind.	30,000.00

[fol. 2421]

District #11.

E-X-H-I-B-I-T a

KROGER STORES

CITY	STREET & NO.
446	Owenton, Ky.
721	Harrodsburg, Ky.
2093	Frankfort, Ky.
2299	Lawrenceburg, Ky.
2302	Versailles, Ky.
2513	Carrollton, Ky.
2544	Shelbyville, Ky.
3061	Midway, Ky.
3182	Eminence, Ky.
3221	Nicholasville, Ky.
3421	Frankfort, Ky.
3656	Lancaster, Ky.
4021	Wilmore, Ky.
4518	Frankfort, Ky.
5221	Frankfort, Ky.
5238	Shelbyville, Ky.
5598	LaGrange, Ky.

PRINCIPAL INDEPENDENT COMPETITORS.

FIRM	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
Owenton Grocery Co.	Owenston, Ky.	Ind.	62,000.00
Balls Grocery	Owenton, Ky.	Ind.	20,000.00
Van Arsdal Grocery	Harrodsburg, Ky.	Ind.	31,000.00
Peoples Grocery	Harrodsburg, Ky.	Ind.	31,000.00
Moore Grocery	Frankfort, Ky.	Ind.	50,000.00
Martins Grocery	Lawrenceburg	Ind.	30,000.00
Smith Grocery	Lawrenceburg	Ind.	28,000.00
Van Meter Grocery	Lawrenceburg	Ind.	21,000.00
Howard Grocery Co	Versailles, Ky.	Ind.	40,000.00
Blue Grass Groc.	Versailles, Ky.	Ind.	42,000.00
Redman Groc. Co.	Versailles, Ky.	Ind.	30,000.00
Wood Grocery Co.	Carrollton, Ky.	Ind.	33,000.00
Thomas Grocery	Carrollton, Ky.	Ind.	26,000.00
Hill Grocery	"	Ind.	45,000.00
Blakemore Groc.	Shelbyville, Ky.	Ind.	75,000.00
Wilmoth Groc.	"	Ind.	30,000.00
Finchs Groc.	"	Ind.	26,000.00
Noel Bros. Groc.	Midway, Ky.	Ind.	26,000.00
W. A. Gatrell	Midway, Ky.	Ind.	30,000.00
Fred Berry Groc.	Eminence, Ky.	Ind.	58,000.00
Terrill Groc.	Eminence, Ky.	Ind.	30,000.00
T.C.Willis Co.	Nicholasville, Ky.	Ind.	47,000.00
Cobbs Groc.	Nicholasville, Ky.	Ind.	18,000.00
Funk Groc.	Nicholasville, Ky.	Ind.	26,000.00
Home Groc. Co.	Frankfort, Ky.	Home Gro.Co.	30,000.00
Spencer Co.	Lancaster, Ky.	Ind.	33,000.00
McRoberts Groc.	Lancaster, Ky.	Ind.	26,000.00
Kahn Groc.	Wilmore, Ky.	Ind.	30,000.00
Deitz Groc.	"	Ind.	25,000.00
Little Groc.	"	Ind.	20,000.00
Marshalls Groc.	Frankfort, Ky.	Ind.	36,000.00
Dewitt Grocery	Frankfort, Ky.	Ind.	25,000.00
Wilmoth Groc.	Shelbyville, Ky.	Ind.	30,000.00
Finchs Grocery	"	Ind.	26,000.00
Barr Groc.	LaGrange, Ky.	Ind.	26,000.00
Ballard Groc.	"	Ind.	10,500.00
Jennings Groc.	"	Ind.	20,000.00

District #12

EXHIBIT "A"

KROGER STORES — PRINCIPAL INDEPENDENT COMPETITORS

CITY	STREET & NO.	FIRM NAME	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
174	Campbellsville, Ky.	W. R. Hoskins	Campbellsville, Ky.	Ind.	75,000.00
		Callison Groc.	Campbellsville, Ky.	Ind.	70,000.00
1287	Somerset, Ky.	Fletcher Groc.	Somerset, Ky.	"	60,000.00
		W. Setton	Somerset, Ky.	I. G. A.	70,000.00
		G/ Mc Kinnery	"	Ind.	50,000.00
2208	Harlan, Ky.	Clarence Saunders	Harlan, Ky.	Ind.	65,000.00
		W. H. Pennington	"	"	100,000.00
		Smith Groc. Co.	"	"	60,000.00
		Moss. Groc. Co.	"	"	40,000.00
3364	Danville, Ky.	Shiars Cure	Danville	Ind.	45,000.00
		Jones, Bros.	"	I.G.A.	60,000.00
		R. Foley	"	Ind.	50,000.00
		W. D. Lunford	"	Ind.	40,000.00
3368	Mt. Vernon, Ky.	Dows Meat Market	Mt. Vernon, Ky.	"	26,000.00
		John Rowe	Mt. Vernon, Ky.	"	48,000.00
		George Parrett	"	"	25,000.00
3422	Stanford, Ky.	E. B. Campbell	Stanford, Ky.	"	55,000.00
		Goods Grocery	"	"	23,000.00
		John Warner	"	"	45,000.00
3603	Pineville, Ky.	City Market	Pineville, Ky.	I.G.A.	40,000.00
		Henry Slusher	"	Ind.	50,000.00
3665	Lebanon, Ky.	B. B. Grocery	Lebanon, Ky.	"	70,000.00
		Comstock Groc.	"	"	60,000.00
		Molon Groc.	"	"	90,000.00
3677	Springfield, Ky.	McElroy & Shoder	Springfield, Ky.	"	75,000.00
		Tatum & Robertson	"	"	73,000.00
		Barnett Grocery Co	"	"	50,000.00
3752	London, Ky.	Pennington Bros.	London, Ky.	Ind.	40,000.00
		Joe. Smith	"	"	35,000.00
		James Carrol	"	"	40,000.00
3881	Middlesboro, Ky.	Owsley & Son	Middlesboro, Ky.	"	100,000.00
		Schneider & Son	"	"	55,000.00
		S. Latliff	"	I.G.A.	40,000.00
		H. Latliff	"	I.G.A.	40,000.00
		W. Cunningham	"	I.G.A.	30,000.00
		S. Hoffners Gro.	"	I.G.A.	100,000.00
3906	Pineville, Ky.	Gatliff Cash Store	"	Ind.	50,000.00

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District #12
Continued.

E-X-H-I-B-I-T "A"

KROGER STORES		PRINCIPAL INDEPENDENT COMPETITORS			
CITY	STREET & NO.	FIRM NAME	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
4573	Somerset, Ky.	Boston Grocery	Somerset, Ky.	Ind.	78,000.00
5206	Corbin, Ky.	Gabbard & Pennington	Corbin, Ky.	Ind.	50,000.00
		Chapples Grocery	Corbin, Ky.	I.G.A.	40,000.00
		W. M. Stonley	Corbin, Ky.	Ind.	45,000.00
5208	Danville, Ky.	W. B. Martin	Danville, Ky.	Ind.	90,000.00

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EXHIBIT "B"
Dist. #9

LICENSE

Store No.	Address	City Soft Drinks	County Soft Drinks	City Cigarettes	County Cigarettes	County Oleo	City Meat	Egg Dealers	City Grocery
2130	509 E. Maxwell St. Lexington, Ky.		6.00		11.00	11.00			30.00
2184	216 E. Seventh St. "		6.00		11.00	11.00			30.00
2185	934 S. Limestone St. "		6.00		11.00	11.00			30.00
2245	383 S. Broadway St. "		6.00		11.00	11.00			30.00
2522	148 N. Broadway "		6.00		11.00	11.00			30.00
2662	1190 N. Limestone "		6.00		11.00	11.00		2.00	30.00
2704	208 E. Third St. "		6.00		11.00	11.00			30.00
3060	500 E. Third St.. "		6.00		11.00	11.00			30.00
3062	112 N. Hanover St. "		6.00		11.00	11.00			30.00
5226	Maxwell & Woodland "		6.00		11.00	11.00			50.00
5227	208 E. Main St. "		6.00		11.00	11.00			50.00
5228	145 N. Limestone "		6.00			11.00			40.00
5232	852 E. High St. "		6.00		11.00	11.00			40.00
5245	600 N. Limestone "		6.00			11.00			40.00
5246	102 E. Maxwell St. "		6.00			11.00			40.00

EXHIBIT "B"
Dist. 10

LICENSE

Store No.	Address	City Soft Drinks	County Soft Drinks	City Cigarette	County Cigarette	County Oleo	City Meat	Egg Dealers	City Grocery
703	Owingsville, Kyl		6.00		11.00	11.00		2.00	
861	800 Main St., Paris, Ky.	25.00	6.00	10.00	11.00	11.00		2.00	25.00
946	Main St. Winchester, Ky.		6.00	20.00	11.00	11.00		2.00	15.00
1708	Mt. Sterling, Ky.		6.00	25.00	11.00	11.00		2.00	
2086	Lex.Ave. Winchester, Ky.		6.00	20.00	11.00	11.00		2.00	15.00
2537	715 Main, Paris, Ky.	25.00	6.00	10.00	11.00	11.00	10.00	2.00	25.00
2660	521 Georgetown St.Lexington,Ky.		6.00		11.00	11.00			30.00
3254	Richmond, Ky.	10.00	6.00	15.00	11.00	11.00		2.00	10.00
3369	Irvine, Ky.	5.00	6.00	10.00	11.00	11.00		2.00	20.00
3417	Georgetown, Ky.		6.00	15.00	11.00	11.00	15.25		50.00
5222	146 Main St. Georgetown, Ky.		6.00			11.00		2.00	50.00
5231	1035 S.Lime, Lexington, Ky.		6.00		11.00	11.00			40.00
5225	Short & B'way,Lexington, Ky.		6.00		11.00	11.00			50.00
5229	641 E. Main, Lexington, Ky.		6.00		11.00	11.00			40.00
5236	707 Main St.,Paris, Ky.		6.00			11.00		2.00	25.00
5240	25 E. Main, Winchester, Ky.		6.00			11.00		2.00	15.00

[illegible]	[illegible]									
[illegible] St. Winchester, Ky.		6.00			11.00			2.00	15.00	

[fol. 247]

District #11 EXHIBIT "B"

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L-I-C-E-N-S-E

STORE NO.	ADDRESS	CITY SOFT DRINK	COUNTY SOFT DRINK	CITY CIGARETTES	COUNTY CIGARETTES	COUNTY OLEO	CITY MEAT	EGG DEALER	CITY GROCERY	MILL FEED
446	Owenton, Ky.	25.00	6.00	5.00	11.00	11.00		2.00	25.00	
721	Harrodsburg, Ky.		6.00	5.00	11.00	11.00		2.00		
2033	208 Main St., Frankfort, Ky.	5.00	6.00	20.00	11.00	11.00		2.00	20.00	
2299	Lawrenceburg, Ky.		6.00		11.00	11.00		2.00	10.00	
2302	Versailles, Ky.	25.25	6.00		11.00	11.00	50.25	2.00		
2513	Carrollton, Ky.	15.00	6.00		11.00	11.00	10.00	2.00		
2544	Shelbyville, Ky.	10.00	6.00		11.00	11.00		2.00	40.00	
3061	Midway, Ky.		6.00		11.00	11.00		2.00		
3182	Eminence, Ky.	15.00	6.00	15.00	11.00	11.00		2.00	20.00	
3221	Nicholasville, Ky.	10.00	6.00	25.00	11.00	11.00		2.00	20.00	
3421	212 Second St. Frankfort, Ky.	5.00	6.00	20.00	11.00	11.00		2.00	20.00	
3656	Lancaster, Ky.	5.00	6.00	15.25	11.00	11.00		2.00		
4021	Wilmore, Ky.	10.00	6.00	52.50	11.00	11.00		2.00	20.00	5.00
4518	311 St. Clair St, Frankfort, Ky.	5.00	6.00	20.00	11.00	11.00	25.00	2.00	20.00	
5221	Frankfort ,Ky.	5.00	6.00			11.00	25.00	2.00	20.00	
5238	Shelbyville, Ky.		6.00			11.00	25.00	2.00	50.00	
5393	LaGrange, Ky.	5.00	6.00		11.00	11.00		2.00	10.00	

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District #12 EXHIBIT "B"

L-I-C-E-N-S-E

STORE NO.	ADDRESS	City SOFT DRINK	COUNTY SOFT DRINK	CITY CIGARETTES	COUNTY CIGARETTES	CO. OLEO	CITY MEAT	EGG DEALER	CITY GROCERY
174	Campbellsville, Ky.	20.00	6.00		11.00	11.00		2.00	
1287	Somerset, Ky.	10.00	6.00	15.00	11.00	11.00		2.00	35.00
2208	Harlan, Ky.	12.00	6.00	12.00	11.00	11.00	7.00		22.00
3364	Danville, Ky.	25.00	6.00	12.00	11.00	11.00		2.00	20.00
3368	Mt. Vernon, Ky.	10.00	6.00	15.00	11.00	11.00		2.00	10.00
3422	Stanford, Ky.		6.00		11.00	11.00		2.00	
3603	102 Virginia Pineville, Ky.	6.00	6.00	11.00	11.00	11.00	7.00		20.00
3665	Lebanon, Ky.	6.00	6.00	50.00	11.00	11.00		2.00	
3677	Springfield, Ky.	10.00	6.00		11.00	11.00			10.00
3752	London, Ky.		6.00			11.00		2.00	5.00
3881	Middlesboro, Ky.	10.00	6.00	15.00	11.00	11.00	15.00	2.00	20.00
3906	Pineville, Ky.	6.00	6.00	11.00	11.00	11.00		2.00	20.00
4573	Somerset, Ky.	10.00	6.00	15.00	11.00	11.00		2.00	35.00
5206	Corbin, Ky.	5.00	6.00		11.00	11.00			10.00
5208	Danville, Ky.	25.00	6.00			11.00		2.00	20.00

[fols. 249 & 250] EXHIBIT "C"



[fol. 251] AFFIDAVIT OF D. T. PETTY

Evansville, Indiana.

STATE OF INDIANA,
County of Vanderburg, ss:

Mr. D. T. Petty being first duly sworn says as follows:

I am 31 years of age and live with my family in Evansville, Indiana. I have been engaged in the grocery business about 9 years and the last 6 years I have had charge of district 14 of the Louisville Branch of the Kroger Grocery & Baking Company. This particular district was part of the organization of Piggly Wiggly Valley Company and at that time I was supervisor for that concern.

There are 6 stores owned and operated by The Kroger Grocery and Baking Company in this territory which comprises the counties of Davies, Hopkins, Henderson, Christian. As Superintendent, I visit each of these stores at least once every two weeks. My duties consist of selecting managers, checking the stock in the stores, and the sales made by each particular store. I advise the managers in regard to merchandising problems and I keep in close touch with the business done by our competitors. I often have occasion to stop in their stores and in this way I have a general idea of the stock they carry, the number of clerks they employ, and the amount of business they do. By reason of my duties and because of my familiarity with the location of the stores operated by competitors of The Kroger Grocery and Baking Company in my territory, I can estimate the approximate yearly sales of these competitors and the affiliation of almost all of them. The average annual sales of each of the Kroger stores that I supervise [fol. 252] is about $40,000.00.

The Kroger Grocery & Baking Company operates two stores in Owensboro, Kentucky which are under my supervision. One is located at 116 Second Street and the other store is at 312 Fredrica Street. The principal independent competitors who operate only a single store are as follows:

Frederica Market, Independent, located on Frederica Street whose sales I estimate at $60,000.00 a year.

Thomas Bader at West Fourth Street whose annual sales I estimate at $80,000.00.

J. H. McLimore on West 9th Street has a store of which the sales are about $25,000 according to my estimate. J. H. McLimore is a member of the Independent Grocers Alliance. As a result he receives posters and advertising material from the central headquarters. He has the advantage of common purchasing power with a great number of other stores. His store front is similar to the store fronts of other individual merchants who operate a single store but are members of Independent Grocers Alliance. McLimore sells oleomargarine and cigarettes. As a result he pays a license tax to the state which is about $22.00. His tax on the sales which I estimate at $25,000.00 are at the rate of 1/20th of 1% and would amount to $12.50. Consequently, he would have no tax to pay because the Kentucky Gross Sales Statute allows him to deduct the special license taxes which he pays to the state. On the other hand, each of the Kroger Stores in the city of Owensboro, Kentucky, would have a tax of about $400.00. Each store would be taxed at the rate of 1% because the sales of each store would be aggregated with the sales of every other Kroger store in the state of Kentucky.

The Kroger Grocery and Baking Company operates a grocery in Madisonville, Kentucky. The principal competitors of this store are as follows:

W. H. Arnold whose annual sales I estimate at $25,000.00. [fol. 253] G. T. Beeney whose annual sales I estimate at $25,000.00.

George H. Fuchs, estimated annual sales $20,000.00.

I do not believe that there is any competing store in Madisonville, Kentucky, that is operated by an individual or a corporation who does not own or operate any other store that would have any tax to pay, because in each case the deductions permitted would completely offset the tax. On the other hand, the store operated by The Kroger Grocery & Baking Company would have a tax of about $400.00.

The Kroger Grocery & Baking Company operates two stores in the city of Henderson, Kentucky. These are located at 234 South Second Street and 102 N. Main Street. The principal competitors are:

Quinn Brothers whose annual sales I estimate at $35,000.00 are located on S. 2nd Street.

J. E. Blanford, Grocery, estimated annual sales $25,000.00.

Willie Weiner, South Second Street whose sales I estimate at $20,000.00.

Louis Keifer whose estimated annual sales are about $25,000.00.

White Front Grocery whose estimated annual sales are about $40,000.00. Four of these competing stores are owned and operated by persons who do not own or operate any other store in the state of Kentucky as far as I know. Each of these four, however, is or has been a member of Independent Grocers Alliance and as a result they receive the benefits derived from connection with that organization. The fifth is owned by an individual who does not operate any other store in the state of Kentucky as far as I know. The owner of this store is associated with Urma, a cooperative buying association, and as a result receives the benefit of quantity buying and mass merchandising. He receives the benefit of the cooperative advertising of the central Urma organization.

None of the stores in Henderson, Kentucky would, in my [fol. 254] opinion, have any taxes to pay because each of them would be able to set off the taxes that they now pay the state for special license taxes. However, the Kroger stores would be subjected to a 1% tax and each of them would have to pay $400.00.

The Kroger Grocery and Baking Company operates a store in Hopkinsville, Kentucky, over which I have supervision. Some of our competitors of this store in Hopkinsville, Kentucky, who do not own or operate any other stores in the state of Kentucky are, to the best of my knowledge, as follows:

Curtis and Company, W. 7th Street, whose annual sales I estimate to be about $65,000.00.

Cox and Wilson, whose annual sales I estimate to be $50,000.00.

J. T. Walker, 602 S. Main Street, estimated annual sales $55,000.00.

Heltsley Brothers, East 7th Streeet, estimated annual sales $30,000.00.

Clark Cliff, South Main, whose annual sales I estimate at $35,000.00.

I do not believe that any of the stores competing with The Kroger Grocery and Baking Company in this county that are owned by persons who do not own any other store would have any tax to pay under the Gross Sales Tax Law because of the setoffs which they are allowed.

The Gross Sales Tax of $400.00 on each of the Kroger stores is prohibitive and confiscatory. There are a great number of competing merchants and a 1% tax that is levied on some and not on all, would give those merchants not taxed an advantage over those who must pay. The profits which we endeavor to make are about 1½ to 2% on gross sales, but we are not able to make this profit at all times and some of our stores for the last two years have operated at a loss. The 1% tax would increase the loss as to these stores and take the major part of the profit where we are making it. As the result of the imposition of the Gross Sales tax, our competitors who operate their business efficiently would be able to undersell us by 1%, but they would not have to pay any tax on the increased business because of the setoffs which they are [fol. 255] allowed to take.

It would be impossible for The Kroger Grocery and Baking Company to open new stores because the profits of the new stores would be wiped out by the tax. However, competitors of The Kroger Grocery and Baking Company who operate or own a single store could open new stores without subjecting themselves to the tax.

I believe that if the sales of each of the stores which are members of Independent Grocers Alliance would be aggregated the same as the sales of each Kroger store are aggregated with the sales of every other Kroger store in the state, that these merchants would fall in the highest bracket and would have to pay a 1% tax However, the members of the cooperative associations pay nothing. In spite of this fact, they enjoy the advantages which the stores owned by Kroger have as a result of being members of the Kroger organization. The central headquarters of Independent Grocers Alliance send special supervisors to the member stores who cooperate with the retailer in assisting and developing of the business. These supervisors are experts in the grocery business and they assist the retailer much in the same manner as I assist the Kroger managers.

Every Kroger store is a separate unit under its own manager. Separate records are kept for each store. Each store is charged with taxes and rent and with the goods it purchases and each store is credited with the sales it makes. However, the Kentucky Gross Sales Statute does not treat the Kroger Stores as separate units but aggregate the sales of all its stores, thus subjecting each store to a 1% tax on its gross sales. In contrast to this, the Kentucky Sales Tax Statute disregards the benfits received by voluntary association of independent store own-
[fol. 256] ers and permits those owners to operate without paying any tax.

D. T. Petty.

Sworn to before me this 14th day of January, 1931. Jessie Rohrscheib, Notary Public of Vanderburg County, Indiana. My com. ex. Nov. 20, 1931. (Seal of Notary Public, Indiana.)

[fol. 257]

EXHIBIT "A"

L-i-c-e-n-s-e

District #14

Store No.	Address	City soft drinks	County soft drinks	City cigarettes	County cigarettes	County oleo	City meat	Egg dealer	City grocery	City oleo
693	Madisonville, Ky..... 234 Second St.	8.25	6.00	15.75	11.00	11.00	.....	2.00	.....	8.25
2075	Henderson, Ky..... 102 No. Main St.	10.00	6.00	10.00	11.00	11.00	25.00	....	20.00	....
4085	Henderson, Ky.....	10.00	6.00	.....	.....	11.00	25.00	2.00	20.00	....
5223	Hopkinsville, Ky.....	.....	6.00	.....	.....	11.00	.....	2.00	40.00	....
5234	116 So. Second St. Owensboro, Ky..... 312 Frederica St.	.....	6.00	.....	.....	11.00	.....	2.00	15.00	....
5235	Owensboro, Ky.....	.....	6.00	.....	.....	11.00	.....	2.00	15.00	....

[fol. 258] AFFIDAVIT OF ALBERT B. BERGER

STATE OF OHIO,
County of Hamilton, ss:

Albert B. Berger, being first duly sworn, deposes and says as follows:

My name is Albert B. Berger, I am 31 years of age, and I live with my family in Cincinnati, Ohio. I have been engaged in the grocery business for eighteen years, and during that time, I have been associated with Depenbrock Grocery located at 815 Monmouth Street, Newport, Kentucky, and with The Kroger Grocery & Baking Company. The owner of Depenbrock Grocery does not own or operate any other store in the State of Kentucky. This store is conducted in the same manner that the Kroger stores that I supervise. It sells the same kind of food to the same public. The only difference between Depenbrock and Kroger is that Depenbrock delivers and Kroger does not.

I was Assistant Manager for Depenbrock for about six years, and with the Kroger Grocery & Baking Company, I served as a clark in the store, store manager, supervisor, assistant Branch Manager, Branch Manager and Superintendent.

At present and for the last year, I have been Superintendent, having charge of 125 stores, 82 of which are situated in Kentucky. Most of these stores are in Covington, Newport, Ft. Thomas, Bellevue, and Dayton, Kentucky, and the counties surrounding these cities. As Superintendent of the stores, I usually visit them at least once every three weeks. I keep check of the stock carried in the store, I check the sales made, I advise the managers as to the problems of merchandising, and it is part of my duty to be acquainted with competitive conditions in regard to each store.

I am acquainted with the location of the store operated by each merchant competing with the various Kroger stores [fol. 259] under my supervision, and in a general way, I am acquainted with the stock carried by these competitors and the number of employees of each competitor. I am acquainted with the affiliations of these stores, and I can estimate the approximate gross annual sales of each of the stores competing with the Kroger stores under my supervision.

On Exhibit A, attached hereto, and made a part hereof, I have listed the Kroger stores under my supervision, together with the location of each store. In Columns 3 and 4, I have listed merchants competing with each of the stores under my supervision, who do not operate more than one store. In Column 5, I have listed the approximate annual sales of each competitor.

On Exhibit B, attached hereto and made a part hereof, I have listed the taxes which each of the stores under my supervision has to pay. The taxes paid by our competitors under the same circumstances are equal to the taxes of each Kroger store.

The average sales of each of the Kroger stores under my supervision is about Forty Thousand ($40,000) Dollars per year. In my opinion, some of the independent merchants competing directly with neighboring Kroger stores have gross annual sales which exceed the annual sales of the nearby Kroger store.

A grocery store competes with the merchant selling similar articles whose store is in the vicinity and the store, and the sales thereof, is not affected by the fact that another merchant operates a store or a group of stores in another part of the state. The Kroger stores under my supervision compete directly with the independent merchants listed on Exhibit A. In each case the Kroger stores and the competitors are selling similar articles, viz: groceries, to the same public. There is no monopoly in the grocery business in the district under my supervision and the field is highly competitive.

[fol. 260] The average sales of the independent competitors in the district under my supervision are about Thirty Thousand ($30,000) Dollars per year. Under the gross sales tax law of the State of Kentucky, the average merchant would have to pay one-twentieth of one per cent (1/20th of 1%), or Fifteen ($15) Dollars. Practically all grocers in this district sell Oleomargarine and pay the state license tax of Eleven ($11) Dollars. A majority of them sell cigarettes and pay an additional license fee of Eleven ($11) Dollars. These special license fees amounting to Twenty-two ($22) Dollars would completely offset the Fifteen ($15) Dollars tax required under the Gross Sales Tax law, and as a result the average merchant who oper-

ates only a single store would have no tax to pay. On the other hand, in the case of the Kroger stores, each would be subjected to a tax which would not be based on the sales in that particular store but which would be based on the aggregate sales of all the Kroger stores in the State of Kentucky, which I understand to be Twelve Million ($12,000,000) Dollars. As a result each store would be subjected to a One (1%) Per Cent tax, which would amount to about Four Hundred Sixty ($460) Dollars. The Kroger Grocery & Baking Company would be permitted to deduct the same license tax as the independent competitors, however, the tax levied on each of the Kroger stores would be so large that even after deduction, they would still have about $425.00 to pay on each store. As a result, the only competitors of The Kroger Grocery & Baking Company who would have a tax to pay would be those who operated a number of stores and whose aggregate sales in all of the stores was taken as a basis for the tax.

The profits from store operation in the district under my supervision which we endeavor to make, is about Two (2%) Per Cent on gross sales. Where we are able to make a profit of (2%) Per Cent on gross sales, a 1% tax would [fol. 261] take about half of this profit, and if we failed to make the Two (2%) Per Cent profit, the One (1%) Per Cent tax would turn our profit into a loss, or in the event we were losing on a particular store, it would increase our loss. The taxes, therefore, are oppressive and prohibitive. It is practically impossible to operate a store and pay a tax of Four Hundred Fifty ($450) Dollars. It would be impossible to increase business because all of the increased business would be subjected to a One (1%) Per Cent tax. It would be impossible to open new stores because the sales of the new stores would be added to the sales of the old stores and as a result, subjected to the One (1%) Per Cent tax. On the other hand, competitors who at present operate only a single store, could increase business or open new stores without subjecting themselves to any tax.

As a result of the One (1%) Per Cent levy on the Kroger stores and the failure to assess any tax against competitors operating single stores these competitors would have an unfair advantage.

Many of the merchants who operate a single store which are competing with the Kroger stores under my super-

vision, are now members of cooperative associations and as a result, they receive the benefits of mass buying, mass purchasing and group advertising. I am att-ching hereto and marking as Exhibit C, copies of advertising by A. C. S. stores and I. G. A. stores which are voluntary associations operating in my district.

Many of the competitors have joined the Cincinnati Wholesale Grocers Association which is also a voluntary cooperative society. I believe that if the members of the cooperative societies had their sales aggregated that they would be subjected to a One Per Cent (1%) tax the same as the Kroger stores. However, under the Kentucky Gross Sales Tax law, each of these stores is treated as a separate unit for the purpose of taxation. In the Kroger organization, each store is a separate unit and separate records are [fol. 262] kept for each store. Each store is charged with its rent, its purchases and credited with its sales. This separation, however, is disregarded by the Kentucky Gross Sales Tax law which requires the aggregation of the sales of all Kentucky stores.

Albert B. Berger.

Sworn to before me and subscribed in my presence this 28 day of January, 1931. Harry Kasfir, Notary Public, Hamilton County, Ohio. (Notarial seal of Harry Kasfir, Hamilton County, Ohio.)

[fol. 263]

EXHIBIT "A"

Kroger Stores

Principal Independent Competitors

City	Street & No.	Firm name	Addresses	Estimated annual sales
Newport	648 Monmouth St.	Raymond Lippert	621 Monmouth St.	75,000.00
	101 W. Fifth St.	Fred Hindmarch	Fourth & Columbia	50,000.00
	413 E. Third St.	J. W. Wetzel	3rd & Park	75,000.00
	109 E. Third St.	J. W. Wetzel	" "	75,000.00
	529 Overton St.	Reis Bros.	4th & Overton	50,000.00
	948 Monmouth St.	Hilbert Bros.	925 Monmouth	30,000.00
	945 Central Ave.	Krebs & Suter	9th & Central	40,000.00
	402 E. Tenth St.	C. J. Radley	11th & Central	30,000.00
	221 W. 11th St.	H. A. Weber	11th & Patterson	30,000.00
	719 Patterson St.	Phil. Haberbusch	7th & Patterson	35,000.00
	1118 Patterson St.	L. Burkart	11th & Patterson	20,000.00
	2 E. 11th St.	A. W. Stratman	33 E. 11th St.	35,000.00
	838 Monmouth St.	Hilbert Bros.	925 Monmouth St.	30,000.00
Dayton	639 Sixth St.	Berenden	929 Fourth St.	65,000.00
	206 Sixth St.	A. Day	137 6th St.	25,000.00
	301 Clay St.	Berendsen	929 Fourth St.	
	1101 Third St.	Niemeyer, 1031 5th St.	1031 5th St.	40,000.00
	503 Sixth Ave.	H. Miller	201 6th St.	25,000.00
Bellevue	201 Fairfield Ave.	Meifert's Groc.	Berry & Fairfield	25,000.00
	336 Taylor Ave.	N. Bihl	Center & Division	40,000.00
	366 Berry St.	N. Bihl	Center & Division	40,000.00
	600 Center St.	N. Bihl	Center & Division	40,000.00
	300 Walnut St.	N. Bihl	Center & Division	40,000.00
	501 Fairfield Ave.	L. Bischoff	705 Fairfield	25,000.00
Ft. Thomas	1041 S. Ft. Thomas	Highland Groc.	1051 S. Ft. Thomas	65,000.00
	913 N. Ft. Thomas	C. F. Nagel	901 N. Ft. Thomas	90,000.00
	44 N. Ft. Thomas	Geo. P. Stegner & Sons	30 N. Ft. Thomas	75,000.00
Clifton	68 Park Ave.	Mrs. Weber	Main & Park	20,000.00
Southgate	210 Evergreen	Schindler	Custis & Alexandria	20,000.00
Alexandria	Main St.	Hess & Roche	Main St.	15,000.00
Silver Grove	Lower Rive-Rd.	Glen Jolly	River & 4 Mile Rd.	35,000.00

[fol. 264]

Cynthiana	101 Pike St.	Rees & Rees	103 Pike Street	30,000.00
	Main & Pleasant	Riester	Main & Pleasant	20,000.00
Covington	101 Madison	C. A. Brandenburg	1048 Madison	20,000.00
	1316 Greenup	Saurber Grocery	1502 Greenup	25,000.00
	631 Madison Ave.	Geo. C. Goode	18 W. 7th St.	90,000.00
	521 E. 20th St.	N. Werning	600 Delmar	30,000.00
	2046 Madison	Kess Bros.	2001 Scott St.	50,000.00
	4001 De Coursey	John Gerwes	3935 De Coursey	30,000.00
	1601 Holman St.	H. H. Hoefker	1634 Holman	50,000.00
	3622 DeCoursey	Chas. Demmin	3606 DeCoursey	35,000.00
	1604 Greenup St.	John Schmitt	1731 Greenup	30,000.00
	1501 Maryland	J. J. Dailey	1557 Maryland	30,000.00
	1902 Garrard	Hais (Chas)	307 E. 19th St.	20,000.00
	331 W. 19th St.	Wm. Hempke	19th & Holman	60,000.00
	4 E. 31st St.	John Glenn	30th & DeCoursey	20,000.00
	1430 Russell St.	Ray Crouch	1431 Russell	20,000.00
	1700 Eastern Ave.	L. J. Schreck & Son	16th & Eastern	25,000.00
	2115 Howell St.	Mrs. E. Brue	1922 Howell	12,000.00
	643 Bakewell St.	John Riesenbeck	701 Bakewell	25,000.00
	401 Pike St.	Irvin Darnell	4th & Pike	35,000.00
	801 Greenup St.	Coyne Bros.	8th & Greenup	40,000.00
	1140 Holman St.	Martina Groc.	12th & Banklick	15,000.00
	601 Main St.	A. B. Dierckes	647 Main St.	40,000.00
	1253 Highway Ave.	Hampton	Altamont & Alberta	25,000.00
	101 W. Sixth St.	Sommers	606 Washington	15,000.00
	226 W. Third St.	G. B. Remley	320 Johnson	30,000.00
	1104 Greenup St.	Gaupohl	11th & Greenup	25,000.00
	268 Pike St.	Frank Hartman	269 Pike St.	35,000.00
	318 Greenup St.	J. Horowitz	317 Greenup	25,000.00
	664 Pike St.	Phil. Mildenberg	712 Pike St.	40,000.00
	393 Madison Ave.	E. Dungan	402 Russell	40,000.00
	725 Madison Ave.	Meyers & Hiltz	703 Madison	45,000.00
	3327 Latonia Ave.	W. G. Perry	33 & Latonia	30,000.00
	4456 DeCoursey	John Gerwes	3935 DeCoursey	35,000.00
	337 W. Southern	G. W. Ellison	Grace & Southern	35,000.00

[fol. 265]

EXHIBIT "A"—Continued

Kroger Stores

Principal Independent Competitors

City	Street & No.	Firm name	Addresses	Estimated annual sales
Ludlow	306 Elm St.	J. A. Lahman	327 Elm	50,000.00
	815 Oak St.	J. Etler	821 Oak St.	35,000.00
	460 Oak St.	Walz Bros.	Helen & Oaks Sts.	35,000.00
Erlanger	30 Lexington Pk.	Jos. Herrmann	29 Lexington Pk.	25,000.00
		Kenney	Erlanger	30,000.00
Bromley	4 Shelby Ave.	Eubanks	Main & Shelby	22,000.00
Florence	Dixie Highway	M. G. Martin	Florence	25,000.00
Ft. Mitchell	Dixie Highway	Kenney	Ft. Mitchell	25,000.00
Elsmere	499 Dixie Hgway	(No. Ind. competitor)		
Augusta	202 Upper St.	R. P. Yates	31 Upper St.	18,000.00
		Mains	235 Upper St.	18,000.00
Maysville	1206 W. Second St.	M. C. Hutchins	1201 W. 2nd	30,000.00
	111 W. 2nd St.	Chas. Conrad	1115 W. 2nd St.	25,000.00
	200 Market St.	Coblitz & Snapp	235 Market	30,000.00
Williamstown	Paris St.	A. N. Skinner	120 S. Main	22,000.00
Carlisle	112 S. Main St.	Sexton	108 S. Main	30,000.00
Walton	22 N. Main St.	F. B. Hammond	Walton	25,000.00
Flemingsburg	121 E. Water St.	Doherty	115 E. Water	25,000.00
Falmouth	124 Shelby St.	G. W. Colvin	Shelby St.	25,000.00

[fol. 266]

EXHIBIT "B"

Taxes and Licenses Paid for Stores in the State of Kentucky
of the Kroger Grocery & Baking Company

City	Store address Street & No.	City soft drink license	County soft drink license	City cigarette license	County cigarette license	State oleo license	City grocery license	City meat license	State egg license	City & school taxes	County & state taxes
Newport	648 Monmouth St.		6.00	None	11.00	11.00	15.00	30.00	None	15.02	11.96
	101 W. Fifth St.		"	"	"	"	"	"	"	"	"
	413 E. Third St.		"	"	"	"	"	"	"	"	"
	109 E. Third St.		"	"	"	"	"	"	"	"	"
	529 Overton St.		"	"	"	"	"	"	"	"	"
	948 Monmouth St.		"	"	"	"	"	"	"	"	"
	945 Central Ave.		"	"	"	"	"	"	"	"	"
	402 Tenth St.		"	"	"	"	"	"	"	None	None
	221 W. Eleventh St.		"	"	"	"	"	"	"	15.02	11.96
	719 Patterson St.		"	"	"	"	"	"	"	"	"
	1118 Patterson St.		"	"	"	"	"	"	"	"	"
	2 E. Eleventh St.	No Tax Unless Served	"	"	"	"	"	"	"	"	"
	838 Monmouth St.		"	"	"	"	"	"	"	"	"
Dayton	639 Sixth St.	5.00	6.00	5.00	11.00	11.00	15.00	15.00	None	47.31	11.96
	206 Sixth St.	"	"	"	"	"	"	"	"	"	"
	301 Clay St.	"	"	"	"	"	"	"	"	"	"
	1101 Third St.	"	"	"	"	"	"	"	"	"	"
	503 Sixth Ave.	"	"	"	"	"	"	"	"	"	"
Bellevue	201 Fairfield Ave.	None	6.00	10.00	11.00	11.00	10.00	None	None	38.06	11.96
	356 Taylor Ave.	"	"	"	"	"	"	"	"	"	"
	366 Berry St.	"	"	"	"	"	"	"	"	"	"
	600 Center St.	"	"	"	"	"	"	"	"	"	"
	300 Walnut St.	"	"	"	"	"	"	"	"	"	"
	501 Fairfield	"	"	"	"	"	"	"	"	"	"
Ft. Thomas	1041 S. Ft. Thomas	10.00	6.00	None	11.00	11.00	None	None	None	53.33	11.96
	913 N. Ft. Thomas	"	"	"	"	"	"	"	"	"	"
	44 N. Ft. Thomas	"	"	"	"	"	"	"	"	"	"

12—30

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EXHIBIT "B"—Continued

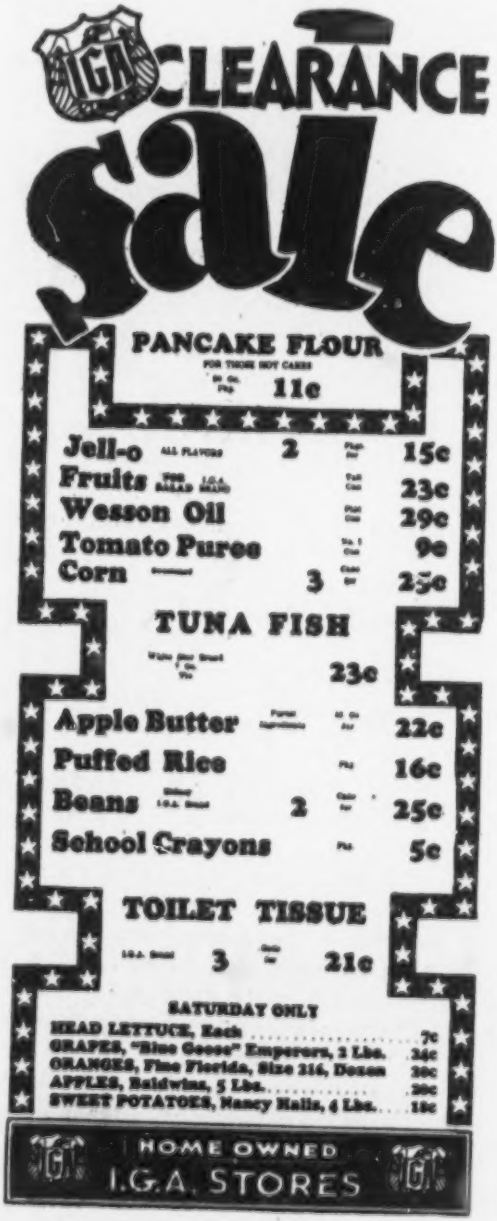
Taxes and Licenses Paid for Stores in the State of Kentucky of the Kroger Grocery & Baking Company

City	Store address Street & No.	City soft drink license	County soft drink license	City cigarette license	County cigarette license	State oleo license	City grocery license	City meat license	State egg license	City & school taxes	County & state taxes
Clifton	68 Park Ave.	5.00	6.00	None	11.00	11.00	10.00	5.00	None	32.51	11.96
Southgate	210 Evergreen Ave.	None	6.00	None	"	"	5.00	5.00	None	22.61	11.96
Alexandria	Main St.	None	6.00	None	11.00	11.00	50.00	None	.....	7.50	11.96
Silver Grove	Lower River Rd.	None	6.00	None	11.00	11.00	None	None	None	None	11.96
Cynthiana	101 Pike St.	25.00	6.00	10.00	11.00	11.00	None	None	2.00	57.00	25.79
[fol. 267]											
	Main & Pleasant	"	"	"	"	"	"	"	"	"	"
Covington	1101 Madison	10.00	6.00	None	11.00	11.00	10.00	None	None	28.19	12.49
	1316 Greenup St.	"	"	"	"	"	"	"	"	"	"
	631 Madison Ave.	"	"	"	"	"	50.00	"	"	"	"
	521 E. 20th St.	"	"	"	"	"	"	"	"	"	"
	2046 Madison	"	"	"	"	"	"	"	"	"	"
	4001 De Coursey	"	"	"	"	"	"	"	"	"	"
	1601 Holman St.	"	"	"	"	"	"	"	"	"	"
	3622 DeCoursey	"	"	"	"	"	10.00	"	"	"	"
	1604 Greenup	"	"	"	"	"	"	"	"	"	"
	1501 Maryland	"	"	"	"	"	"	"	"	"	"
	1902 Garrard	"	"	"	"	"	50.00	"	"	"	"
	331 W. 19th St.	"	"	"	"	"	"	"	"	None	None
	4 E. 31st St.	"	"	"	"	"	"	"	"	28.19	12.49
	1430 Russell St.	"	"	"	"	"	10.00	"	"	"	"
	1700 Eastern Ave.	"	"	"	"	"	50.00	"	"	"	"
	2115 Howell St.	"	"	"	"	"	10.00	"	"	"	"
	643 Bakewell St.	"	"	"	"	"	"	"	"	"	"
	411 Pike St.	"	"	"	"	"	50.00	"	"	"	"
	801 Greenup St.	"	"	"	"	"	10.00	"	"	"	"
	1140 Holman St.	"	"	"	"	"	"	"	"	"	"
	601 Main St.	"	"	"	"	"	50.00	"	"	"	"

	1253 Highway Ave....	"	"	"	"	"	"	"	"	"	"
	101 W. Sixth St.....	"	"	"	"	"	"	"	"	"	"
	226 W. Third St.....	"	"	"	"	"	10.00	"	"	"	"
	1104 Greenup St.....	"	"	"	"	"	"	"	"	None	None
	268 Pike St.....	"	"	"	"	"	"	"	"	28.19	12.49
	318 Greenup St.....	"	"	"	"	"	"	"	"	"	"
	664 Pike St.....	"	"	"	"	"	50.00	"	"	"	"
	393 Madison Ave.....	"	"	"	"	"	10.00	"	"	None	None
	725 Madison Ave.....	10.00	6.00	None	11.00	11.00	10.00	None	None	None	None
	3327 Latonia Ave.....	"	"	"	"	"	"	"	"	28.19	12.49
	4456 DeCoursey.....	"	"	"	"	"	"	"	"	"	"
[fol. 268]	337 W. Southern.....	"	"	"	"	"	50.00	"	"	"	"
Ludlow.....	306 Elm St.....	None	6.00	None	11.00	11.00	15.00	None	None	25.96	12.49
	815 Oak St.....	"	"	"	"	"	"	"	"	"	"
	460 Oak St.....	"	"	"	"	"	"	"	"	"	"
Erlanger.....	30 Lexington Pk.....	"	6.00	None	11.00	11.00	None	None	None	21.77	12.49
Bromley.....	4 Shelby Ave.....	"	"	"	"	"	"	"	"	"	"
Florence.....	Dixie Highway.....	10.00	"	"	"	"	"	"	2.00	14.66	18.88
Ft. Mitchell....	Dixie Highway.....	None	"	"	"	"	"	"	"	None	12.49
Elsmere.....	409 Dixie Highway...	"	"	"	"	"	"	"	"	12.00	12.49
Augusta.....	202 Upper St.....	15.50	"	"	"	"	"	"	"	37.82	37.87
Maysville.....	1206 W. Second St....	5.00	"	20.00	"	"	15.00	"	"	21.61	16.88*
	111 W. Second St.....	"	"	"	"	"	"	"	"	"	"
	220 Market St.....	"	"	"	"	"	"	"	"	"	"
Williamstown..	Paris St.....	None	"	26.00	"	"	None	"	"	30.60	20.71
Carlisle.....	112 S. Main St.....	10.25	"	20.25	"	"	"	"	"	17.48	11.61
Walton.....	22 N. Main St.....	None	"	None	"	"	"	"	"	28.13	18.87
Flemingsburg..	121 E. Water St.....	10.25	"	"	"	"	"	"	"	11.92	15.14
Falmouth.....	124 Shelby St.....	15.00	"	15.00	"	"	10.00	5.00	"	41.10	29.93
Total.....		516.00	498.00	226.25	913.00	913.00	1425.00	480.00	28.00	2181.57	1063.67

* Bakery Agency $20.00.

[fol. 269] EXHIBIT "C"



[fol. 270] AFFIDAVIT OF JOHN E. DONAHUE

STATE OF KENTUCKY,
County of Jefferson, ss:

John E. Donahue, being first duly sworn, deposes and says as follows:

I am thirty years old and live with my family in Lexington, Kentucky. I have been in the grocery business for the last nine years; operated meat market for about two years and have been a clerk and manager of a store, stock auditor, assistant superintendent and superintendent for the Great Alantic & Pacific Tea Co. For the last two years I acted as superintendent for that Company.

As superintendent I have charge of forty-nine stores in the Eastern part of Kentucky and in the Bluegrass district, which includes the cities of Lexington, Danville, Frankfort and the surrounding territory.

As supervisor of these stores it is my duty to visit them frequently, check up on stock carried, keep tab of the sales which they make and advise the managers in regard to merchandising problems. It is part of my duties to keep the Company informed of the possibility of expansion in any particular territory and it is also part of my duties to be acquainted with the general competitive conditions of the grocery business in the territory under my supervision.

By reason of my duties and because of my acquaintance with the various locations occupied by competitive stores and because of my familiarity with the number of employees and general conditions, I am familiar with the retailing of groceries in the territory under my supervision. I am familiar with the affiliation of competitive stores and with the character of merchandise sold therein. I am acquainted with the tax which the various stores must pay and I am able to estimate the approximate gross sales of the various [fol. 271] stores located in the district.

Exhibit "A" attached hereto and made a part hereof lists in Columns 1 and 2 the Atlantic & Pacific stores under my supervision. I have also listed the individuals and corporations who operate a single store opposite the name of the Atlantic & Pacific store with which that particular individual or corporation competes. Estimated gross sales of these individuals or corporations are listed in Column 5.

The average gross sales of each Atlantic & Pacific store in my territory is about Fifty Thousand ($50,000) Dollars.

There is no monopoly in the grocery business in Kentucky and the field is highly competitive. The Atlantic & Pacific stores under my supervision are subject to the same license tax that is imposed on the individual owners. Under the Gross Sales Tax these licenses are deductable, but the sales tax in the case of the Atlantic & Pacific stores is so high that they still have to pay an exorbitant sum after the deduction. The competitors of these stores, however, who do not own or operate any other store, do not have any tax to pay because their gross sales tax is completely offset by deductions which they are allowed. For example, Atlantic & Pacific have a store in Corbin, Kentucky, which does about Fifty Thousand ($50,000) Dollars of business a year. Pennington & Gabber operate a store in that city which sells the same class of merchandise to the same public. Both of these stores sell Oleomargarine, cigarettes and candled eggs. The tax on the independent store would by 1/20 of 1%, or about $17.50. The cigarette tax, license fee and the oleomargine license would completely offset this tax. The Great Atlantic & Pacific Tea Co., has sales approximating Thirteen Million ($13,000,000) Dollars, in the State of Kentucky. Under the gross sales tax law the tax on each store amounts to Five Hundred Sixty ($560) Dollars. After the deduction is made each store in the Atlantic & Pacific System would still have a Five Hundred ($500) [fol. 272] Dollar tax to pay. This is true in the case of the Corbin store which competes with the store operated by Pennington & Gabber.

In Cumberland they operate a store on Main Street which does about Fifty-Five Thousand ($55,000) Dollars business a year. This store would have a Five Hundred ($500) Dollar tax to pay. The Independent Grocers who are members of Independent Grocers Alliance—an organization which gives to the retailer practically every advantage which members of the Atlantic & Pacific organization have—have no tax to pay.

The same is true in the case of the store at Evart, Kentucky. The competing store owner is a member of the Independent Grocers Alliance and as a result he has advantage of common advertising, mass merchandising, quan-

tity buying and supervision by a trained expert; however, the owner of this store sells Oleomargarine and Cigarettes, and consequently has deductions which relieve him from the payment of any tax. The Atlantic & Pacific, in that city, however, has to pay One (1%) Per Cent on its sales.

Exhibit "B" attached hereto and made a part hereof, lists the stores under my supervision and the tax which each store is to pay. The tax would be the same for each of the competitors of the Atlantic & Pacific Stores which I supervise and the result is the same as shown in the two examples which I have listed. In every case the Atlantic & Pacific store would be subject to a One (1%) Per Cent tax on all of its gross sales due to the fact that its sales are added to the sales of all other Atlantic & Pacific stores in the State of Kentucky, whereas, the competing store which was owned or operated by either an individual or a corporation which did not own any other store, has no tax to pay.

The profits from store operations in the district under my supervision are not over 1½ to 2 per cent on the gross sales. A Five Hundred ($500) Dollar tax on each store is oppressive and prohibitive. It is practically impossible to [fol. 273] operate any store at a profit and pay a Five Hundred ($500) Dollar tax per store. Any increase in business would be taxed at One (1%) Per Cent, which would take almost all of the profit received as a result of the increase in business. The tax is so much that no new stores could be opened which would be profitable. Competitors could undersell us without subjecting themselves to any tax, because their aggregate sales would not exceed Four Hundred Thousand ($400,000) Dollars and they would remain at all times in the last bracket. Some of the stores which I supervise are held under long term leases and the closing of the same would involve heavy losses.

The Independent Grocers Alliance is very active in the district over which I have supervision. This organization gives its members following service: Window posters and instructions in regard to window display. Each member of the association has prominent store fronts and no one member is distinguishable from any other. The central organization sends supervisors to the retailer who advises them in regard to the merchandising of goods, the installa-

tion of stock and advertising in much the same way as I advise the managers of the stores under my supervision.

In the City of Lexington the Independent Grocers Alliance has common advertising for all of its members. Exhibit "C" is a copy of the newspaper advertising of the United Grocers Alliance in the City of Lexington, Ky.

I am informed and believe that if the gross sales of all the members of the Independent Grocers Alliance were added together that the tax on each member would be One (1%) per cent on sales; that is, if they were taxed in the same manner as the Atlantic & Pacific stores the sales of all members would be added together in order to determine the rate of taxation. In effect, however, the members of the cooperative association, although enjoying all the benefits enjoyed by the Atlantic & Pacific stores under my supervision, pay no tax at all.

[fol. 274] I am attaching hereto and marking as Exhibit "D," a picture of our store and the store operated by the M. & C. Cash Grocery, 118 Main Street, Georgetown, Kentucky. These two stores are adjoining. The M. & C. Cash Grocery is a member of the I. G. A. It has a front which is common to all I. G. A. stores, just as the neighboring store which we operate has a front which is common to all stores that we operate. The I. G. A. store sells for cash and makes no deliveries. Its groceries are the same type as handled in our store. Its arrangement is practically the same as ours. Its sales are about as large as the sales in our store. However, its special license taxes would relieve it from the payment of any tax, on the other hand, our store would be subjected to a Five Hundred ($500) Dollar burden under the Gross Sales Tax Law of Kentucky. This situation is an example of the condition that prevails in many neighborhoods. Groceries which are in the immediate vicinity of the Atlantic & Pacific Store which we operate, have no taxes to pay, while our stores have a heavy burden to meet, altho these stores are direct competitors.

I am attaching hereto and marking as Exhibits "E," "F" and "G," wrappers taken from articles purchased at this I. G. A. store in Georgetown. Similar products are sold under the same kind of wrappings in all I. G. A. stores.

Each store in the Atlantic & Pacific system is a separate unit, separate books are kept, and taxes and expenses are charged against each particular store. Each store is charged with goods purchased by it, and credited with the

goods it sells. The aggregation of sales of all the Atlantic & Pacific stores under the Gross Sales Tax statute disregards this separation, but at the same time that statute disregards the common advantages of the members of the Independent Groceries Alliance.

John E. Donahue.

Subscribed and sworn to before me this 4th day of February, 1931. Nadine McCreary, Notary Public, Jefferson County, Ky. (Seal of Nadine McCreary, Notary Public, Jefferson Co., Ky.) Notary Public, Jefferson County, Ky. My commission expires Aug. 11, 1931.

[fol. 275]

EXHIBIT "A"

THE GREAT ATLANTIC & PACIFIC TEA COMPANY

SUP'T. JOHN E. DONAHUE'S TERRITORY

PRINCIPAL INDEPENDENT COMPETITORS

CITY	ADDRESS	FIRM NAME	ADDRESS	ESTIMATED ANNUAL SALES
Barbourville	Main & Pub. Sq.	Bennington Bros.	Barbourville	$50,000
Corbin	222 Center	Pennington & Gabbert	Corbin	35,000
Corbin	715 Main	None	None	———
Cumberland	Main St.	I.O.A.	Cumberland	45,000
Danville	229 W. Main St.	Jones Bros.	Danville,	68,000
Evarts	Tocum St.	I.O.A.	Evarts	41,600
Frankfort	111 Bridge St.	Wooman Brothers	Frankfort	52,000
Frankfort	313 St. Clair	Home Owned	Do	31,200
Frankfort	601 High St.	W. Markhall	Do	47,000
Georgetown	118 Main St.	M.& C. Cash Gro.	Georgetown	31,200
Harlan	103 S. Main St.	W. H. Pennington	Harlan	75,000
Harlan	Tanner Bld.Main St.	Smith Groc.	Do	50,000
Harrodsburg	516 Main St.	A. Patterson	Harrodsburg	62,400
Hazard	216 Main St.	Service Gro. Co.	Hazard	40,000
Hazard	113 Main St. E/S	Parkins Gro.	Do	50,000
Irvine	209 Main St.	F.M. Welch	Irvine	55,000
Jackson	Main Nr. Bdwy	Daniels Market	Jackson	45,000
Lancaster	126 Main St.	M. H. Forbes	Lancaster	31,200
Lawrenceburg	133 S. Main St.	Turner & Brown	Lawrenceburg	31,200
Lexington	185 E. Limestone	Alex Hughes	Lexington	52,000
Lexington	401 S. Broadway	Kelly Hunt	Do	52,000
Lexington	125 N. Broadway	Packing House Mkt.	Do	108,000
Lexington	496 E. High St.	J. L. Rue & Son	Do	41,600
Lexington	Elm Tree Lane	None	None	———
Lexington	933 S. Limestone	None	None	———
Lexington	133 Third St.	None	None	———
Lexington	801 S. Bdwy	Coldglaser & Hafely	Lexington	41,600
Lexington	404 Georgetown	B.N. Foley	Lexington	25,000
Lexington	646 E. Main St.	Rue Grocery	Lexington	78,000
Lexington	568 W. Main St.	Thurston Market	Lexington	62,400
Lexington	432 E. 3rd St.	Powell Gro.	Lexington	31,200
Lexington	1203 Limestone	Yeager's Gro.	Do	23,400
Middlesboro	2026 Cumb St.	S. Cowley & Son	Middlesboro	125,000
Mt. Sterling	42 Main St.	C. Childres	Mt. Sterling	50,000
Neon	Main St.	Chas. Taylor	Neon	75,000
Nicholasville	113 S. Main St.	T. C. Willis	Nicholasville	55,000
Paris	629 Main St.	Chas. Cook	Paris	62,400
Pineville	Pine St.	Cabliff Cash Store	Pineville	60,000
Ravenna	706 Main St.	J. M. Hamilton	Ravenna	45,000
Richmond	112 E. Main St.	O. Ringo	Richmond	40,000
Somerset	107 Mt. Vernon	I.G.A.	Somerset	46,800
Stanford	Main St.	D. Campbell	Stanford	51,000
Versailles	138 Main St.	Howard Bros.	Versailles	36,400
Vicco	Main St.	Dan Watts	Vicco	65,000
Wallins Creek	Howard St.	I.G.A.	Wallins	30,000
Whitesburg	Main & Court	I.C. Hichey	Whitesburg	45,000
Williamsburg	400 Main St.	Pennington & Gabbert	Williamsburg	62,400
Winchester	20 E. Main St.	Here Groc.	Winchester	80,000

[fol. 276]

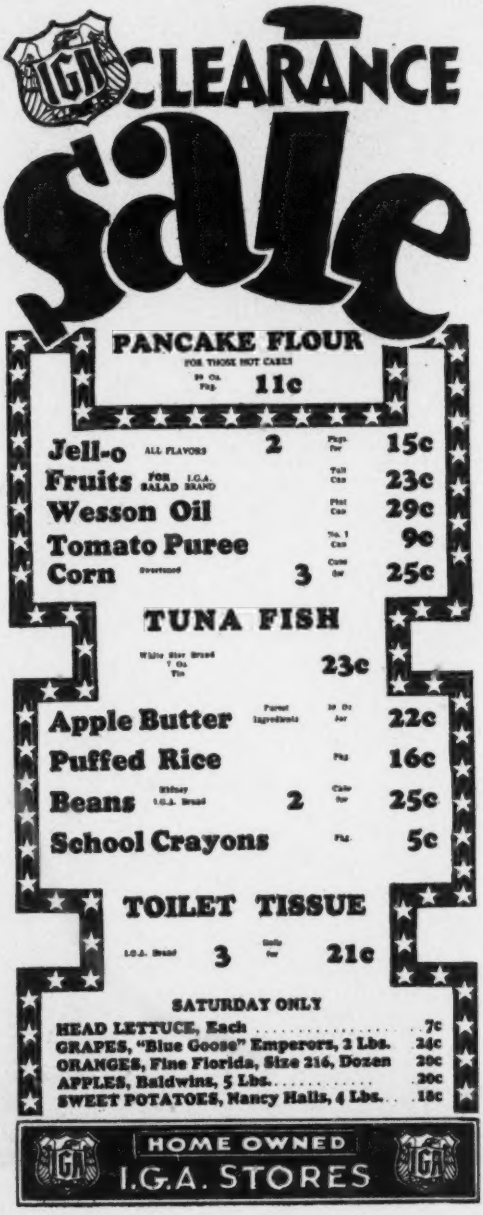
EXHIBIT "B"

THE GREAT ATLANTIC & PACIFIC TEA COMPANY

SUP'T. JOHN E. DONAHUE'S TERRITORY

City	Street Address	Soft Drinks	Oleo	State and County	Cigarettes	City Grocery	City Meat	Egg Dealers	City and School	Miscellaneous	Total
Barbourville	Main & Pub.Sq.	6.00	11.00	26.00	11.00	-	-	2.00	25.00		81
Corbin	222 Center	11.00	11.00	22.00	18.00	10.00	-	2.00	26.00		100
Corbin	213 Main	11.00	11.00	42.00	18.00	10.00	-	2.00	26.00		120
Cumberland	Main St.	6.00	11.00	65.00	22.00	26.00	-	-	15.00		145
Danville	229 W. Main	31.00	11.00	14.00	21.00	25.00	-	2.00	35.00		139
Everts	Tocum St.	12.00	11.00	46.00	17.00	10.00	21.00	-	50.00	5.00 C. Pond	172
Frankfort	111 Bridge	11.00	11.00	21.00	21.00	20.00	25.00	2.00	27.00		138
Frankfort	313 St.Clair	.00	11.00	37.00	21.00	20.00	25.00	2.00	27.00		144
Frankfort	601 High	.00	11.00	23.00	21.00	20.00	35.00	2.00	41.00		154
Georgetown	118 Main St.	6.00	11.00	16.00	26.00	90.00	15.00	2.00	66.00		192
Harlan	103 S. Main	17.00	11.00	72.00	22.00	21.00	6.00	2.00	85.00		236
Harlan	Tom Bl, Main	17.00	11.00	63.00	22.00	21.00	6.00	-	61.00		201
Harrodsburg	516 Main St.	6.00	11.00	37.00	16.00	-	-	2.00	38.00		110
Hazard	216 Main St.	6.00	11.00	41.00	12.00	80.00	-	2.00	145.00		298
Hazard	113 Main, E/S	18.00	22.00	23.00	11.00	61.00	-	-	115.00		304
Irvine	209 Main	11.00	11.00	42.00	21.00	10.00	10.00	2.00	49.00		156
Jackson	Main nr Bway	16.00	11.00	73.00	21.00	25.00	-	2.00	56.00		204
Lancaster	126 Main St.	11.00	11.00	26.00	26.00	-	-	2.00	21.00		97
Lawrenceburg	133 S. Main	26.00	11.00	22.00	11.00	10.00	5.00	2.00	29.00		116
Lexington	185 N. Limestone	6.00	11.00	19.00	46.00	30.00	-	-	41.00		353
Lexington	401 S. Bway	6.00	11.00	21.00	46.00	20.00	-	-	41.00		145
Lexington	125 N. Bway	6.00	11.00	21.00	46.00	20.00	-	-	41.00		145
Lexington	496 E. High	6.00	11.00	20.00	46.00	20.00	-	-	41.00		144
Lexington	Elm Tree Lane	6.00	11.00	20.00	46.00	20.00	-	-	41.00		144
Lexington	933 Limestone	6.00	11.00	20.00	46.00	20.00	-	-	-		103
Lexington	133 - 3rdSt.	6.00	11.00	20.00	46.00	20.00	-	-	41.00		144
Lexington	801 S. Bway.	6.00	11.00	20.00	46.00	20.00	-	-	41.00		144
Lexington	484 Georgetown	6.00	11.00	14.00	46.00	20.00	-	-	41.00		138
Lexington	846 E. Main St	6.00	11.00	10.00	11.00	20.00	-	-	-		58
Lexington	588 W. Main	6.00	11.00	14.00	46.00	30.00	-	-	41.00		148
Lexington	432 E. 3rd St	6.00	11.00	21.00	46.00	20.00	-	-	41.00		145
Lexington	1203 Limestone	6.00	11.00	21.00	46.00	20.00	-	-	41.00		145
Middlesboro	2028 Cumb.	16.00	11.00	67.00	26.00	25.00	15.00	2.00	65.00		227
Mt. Sterling	42 Main St.	-	11.00	55.00	37.00	-	-	2.00	41.00		146
Neon	Main St.	6.00	11.00	15.00	11.00	21.00	-	-	39.00		103
Nicholasville	113 S. Main	6.00	11.00	31.00	36.00	-	35.00	2.00	50.00	5.00 Fish	176
Paris	629 Main St.	6.00	11.00	57.00	18.00	10.00	10.00	2.00	61.00		175
Pineville	Pine St	6.00	11.00	52.00	22.00	20.00	7.00	2.00	68.00		208
Ravenna	706 Main St.	11.00	11.00	66.00	21.00	20.00	-	2.00	64.00		195
Richmond	112 E. Main	16.00	11.00	40.00	26.00	10.00	15.00	2.00	66.00		186
Somerset	107 Mt.Vernon	21.00	11.00	25.00	26.00	30.00	-	2.00	46.00		161
Stamford	Main St.	6.00	11.00	34.00	11.00	-	-	2.00	43.00		107
Versailles	138 Main St.	31.00	11.00	9.00	11.00	-	25.00	2.00	22.00		111
Vicco	Main St.	6.00	11.00	33.00	11.00	52.00	-	-	25.00		138
Walling Creek	Howard St.	16.00	11.00	67.00	22.00	25.00	-	-	47.00		188
Whitesburg	Main & Court	6.00	11.00	82.00	11.00	15.00	-	-	70.00		195
Williamsburg	400 Main St.	6.00	11.00	48.00	11.00	5.00	-	2.00	38.00		121
Winchester	20 N. Main	6.00	11.00	60.00	62.00	-	-	2.00	35.00		176

[fols. 277 & 278] EXHIBIT "C"



[fol. 279]

EXHIBIT "D"



[fol. 280] EXHIBIT "E"



[fol. 281]

EXHIBIT "F"



[fol. 282]

EXHIBIT "G"


9 XII OZS. NET WEIGHT
IGA
GRADE A
CLEANED
CURRANTS
Coffee Cake
One cup bread dough, 2 tablespoons soft butter, 1 egg, 1 tablespoon sugar, ½ cup I.G.A. currants.
Beat this and make into soft loaf, let raise and roll 1 inch thick, raise again and bake, take from oven and spread the top with 1 tablespoon of sweet milk and two of pulverized sugar.
Sold Only At I.G.A. Stores
9 XII OZS. NET WEIGHT
IGA
GRADE A
CLEANED
CURRANTS
I.G.A.
Food Products
—for real economy
The greater value in I.G.A. Food Products is due to the nation-wide I.G.A. buying power which brings you better quality for less money.
Currant Bread
One quart bread dough taken from first raising of bread sponge, 1 tablespoon lard, 1 tablespoon butter, ½ cup sugar. Raise as light as stiff as for white bread. One cup I.G.A. currants, worked in while kneading. Let this raise twice, then make in loaf and bake one hour.

[fol. 283] AFFIDAVIT OF JOHN SCANLAN

STATE OF KENTUCKY,
County of Jefferson, ss:

John Scanlan, being first duly sworn deposes and says as follows:

I am forty years old and live with my family in Louisville, Kentucky, and for the last four years I have been in the meat business. I am associated with The Great Atlantic & Pacific Tea Company in the capacity of Meat Superintendent. I have charge of fifty-three meat markets of which forty are located in the State of Kentucky.

The meat markets operated by The Great Atlantic & Pacific Tea Company are housed in the same quarters as the grocery department; however, the meat department is entirely distinct from the grocery department. The supervisor of the grocery department has nothing to do with the men selling meats or of the purchase or distribution of the meat.

The A. & P. stores which operate meat markets in the State of Kentucky are listed in Exhibit "A". The firm name, address and estimated sales of competitors who operate only one store are listed on the same sheet.

Under the Gross Sales Tax, the meat sales would be added to the grocery sales in order to determine the total sales subject to the tax. The A. & P. meat markets compete with stores which do nothing but sell meat; these stores are taxed on their meat sales alone. It is incorrect, therefore, to add in the sales of groceries in the case of A. & P. when this is not done in the case of competitors. Because of this and because of the fact that all of the sales of A. & P. in the State of Kentucky are aggregated for the purpose of determining the tax, each of the A. & P. meat markets under my supervision would have to pay a tax which would be about one per cent on its gross sales. Each competitor would only have to pay about one-twentieth of one per cent and this one-twentieth would be completely deductible because of license taxes paid to the State.

As a result of the years I have spent in the grocery and meat business, and because of my familiarity with the [fol. 284] location and number of employees of my competitors, I can estimate the gross sales and none of them have sufficient sales to place them in the higher brackets.

The margin of profit in meat which A. & P. receives from each dollar of sale is very low—we have a large turnover, but the profit per dollar of sale does not exceed, at the most, one per cent. If the one per cent tax was imposed under the Gross Sales Tax Law, the amount which A. & P. would have to pay would exceed the profits it would make from the sale of meats. This would mean that A. & P. would have to go out of the meat business; it would have to abandon stores to which it has leases for the sale of meat and it would involve heavy losses to the company.

John Scanlan.

Subscribed and sworn to before me this 6th day of January, 1931. Nadine McCreary, Notary Public. Notary Public, Jefferson County, Ky. My commission expires Aug. 11, 1931. (Seal of Nadine McCreary, Notary Public, Jefferson Co., Ky.)

[fol. 285]

EXHIBIT "A"

The Great Atlantic & Pacific Tea Company

Sup't John Scanlan's Territory

City	Address	Principal independent competitors		
		Firm name	Address	Estimated annual sales
Central City	109 Broad Street	NONE		
Evarts	Yocum St	NONE		
Frankfort	313 St. Clair	Fensel Bros	Frankfort	60,000
Georgetown	118 Main St	NONE		
Harlan	103 S. Main St	NONE		
Harlan	Tamer Bl. Main St	NONE		
Hazard	216 Main St	NONE		
Hazard	113 Main, E/S	NONE		
Hopkinsville	123 Ninth St	NONE		
Lebanon	119 Main St	NONE		
Lexington	401 S. Bdway	Lee Bromley	Upper & Maxw. Lex	20,000
"	496 E. High	LaRue & Son	Wdlawn & Euclid, Lex	35,000
"	933 S. Limestone	L. B. Heathman	Virgn. & Ninth, Lex	15,000
"	133 Third St	NONE		
"	646 E. Main	L. F. Rue	Clay & Main, Lexington	55,000
Louisville	1800 Frankfort Ave	Schoeffie M. Mkt	1810 Frankfort	26,000
"	1902 S. Third St	H. G. Brooks	1800 S. 3rd	78,000
"	3030 S. Fourth	South Lou. M. M.	4th & Central	20,800
"	1215 S. 28th St	Bloemers M. Mkt	1302 28th St	18,150
"	2533 Portland	Schiffer M. Mkt	2618 Portland	15,600
"	4130 W. Broadway	NONE		
"	1237 S. Shelby	Shelby Meat Mkt	1234 S. Shelby St	10,400
"	801 E. Broadway	NONE		
"	844 E. Market	F. Hegan	901 E. Market	26,000

"	Bdstn. & Dundee	Kurz M. Mkt	Dundee Road	36,400
"	501 N. 17th St	NONE		
"	852 S. 3rd St	NONE		
"	4518 Park Blvd	NONE		
"	306 W. Jefferson	NONE		
"	1501 Story Ave	NONE		
"	314 Woodlawn	Keller Market	310 Woodlawn	20,800
"	1501 S. 18th St	NONE		
"	3471 Taylor Blvd	W. Betz	3467 Taylor Blvd	20,800
"	3401 W. Market	J. Gold	3406 W. Market	15,600
"	2632 S. 4th St	NONE		
"	2046 S. Preston	NONE		
"	1614 Bdstn. Rd	A. Katzman	Bonnycastle Ave	18,200
"	605 W. Oak St	NONE		
St. Matthews		Roby & Clemens	St. Matthews	25,000
Louisville	4301 W. Market	NONE		
"	201 N. 26th St	T. McShane	2501 Rowan	7,800
Shively	18th St. Road	NONE		
Madisonville	132 S. Main	NONE		
Middlesboro	2028 Cumberland	NONE		
Mt. Sterling	#2 Main St.	White House M. M	Mt. Sterling	30,000
Neon	Main St	NONE		
Owensboro	120 E. 2nd St	NONE		
Paris	629 Main St	W. P. Phillips	Paris	40,000
Pineville	Pine St.	NONE		
Ravenna	706 Main St	J. Hackworth	Ravenna	15,000
Richmond	112 E. Main	J. M. Culton	Richmond	40,000
Whitesburg	Main & Court	NONE		
Winchester	20 N. Main St	B. Martin	Winchester	40,000

[fol. 286] AFFIDAVIT OF CHRIS SCHUMANN

STATE OF KENTUCKY,
County of Jefferson, ss:

Chris Schumann, being first duly sworn says as follows:

I am forty years old and live with by family in Louisville, Kentucky. I have been engaged in the grocery business fifteen years; I started with The Quaker Maid Company at the age of twenty-four years in the capacity as manager of an individual store for four years, and six years as supervisor with The Quaker Maid, becoming affiliated with the A. & P. Company, as assistant superintendent for three years and superintendent for three years.

As superintendent of the A. & P., I have charge of sixty-two stores in the western section of Louisville and towns surrounding Louisville. As superintendent of these sixty-two stores, I am responsible for the business done in each of them; I organize the sales force; I have charge of the installation of stock and it is part of my duties to see that the moneys received for the sale of stock is paid over to the company. I visit each store at least once in every three weeks and at that time I go over with the manager the business done during the preceding period and I check up sales and receipts for the three weeks preceding my visit.

I keep in close touch with competitive conditions and it is part of my duties to advise the company in the case I believe it would be for the best welfare of the company to expand in certain territories; for this reason I keep check on all competing stores in the neighborhood of the A. & P. stores which I supervise. Because of my familiarity with the stores I supervise, and because of my experience in the grocery business, I can estimate the sales of the competitors of A. & P. from their location; from the number of employees and from the general conditions of the store. A grocery store competes with other grocery stores in the neighborhood. The fact that an organization operates a store or a group of stores in another city has no effect on the stores which I supervise in Louisville. The competition for these stores is offered by the groceries which are within one block [fol. 287] or on the opposite corner. Every one of the stores under my supervision is in direct competition with other stores which are carrying on the same kind of business as

that conducted in any one of the A. & P. stores. The competitors sell the same merchandise and they have the same method of business—the only difference is that in my case I supervise a group of stores, whereas the majority of competitors, whether they are operated by an individual or a corporation, only own a single store.

Groceries having sales of $75,000.00 a year are doing a fairly large business. There are not more than two groceries which are competing with the stores which I supervise that are doing more than $100,000.00 worth of business a year.

The stores which I supervise are listed in Exhibit "A" attached hereto in columns one and two. The principal competitors of each of these stores which are owned by either an individual or a corporation which owns only one store, are listed in column three and the estimated sales of each of the competing stores is listed in column five.

Almost every grocery store in my district has to pay license and special privilege taxes to the State of Kentucky, which taxes run between fifty and seventy-five dollars. On Exhibit "B", I have listed the taxes which each of the stores that I supervise has to pay. Competitors of the stores under my control are selling the same goods as the A. & P. stores and, consequently, they have to pay the same taxes. For example, in the city of Campbellsville, I supervise a store situated at 112 Main Street. This store sells soft drinks and pays a State Tax of $16.00; it pays a special privilege tax of $11.00 for the right to sell oleomargarine; a cigarette tax of $11.00 is paid and there is a $2.00 tax which must be met before the store can handle the sale of eggs. The principal competitor of the Campbellsville store is Hoskins Grocery. This store sells soft drinks, oleomargarine, cigarettes and eggs and its taxes for these special privileges would be similar to the tax imposed on the A. & P. store. The sales of Hoskins Grocery are about $52,000.00 a year. The license taxes which Hoskins would have to pay are deductible from the tax he [fol. 288] has to pay under the Sales Tax Statute; the result would be that Hoskins Grocery would not have to pay any tax under the Gross Sales Law. The A. & P. exemption would be just as large but the A. & P. store would be subjected to a much higher tax since its sales would be lumped with the sales of all other A. & P. stores.

The same result would occur in the case of every A. & P. store under my supervision, i. e., each store would be subject to a heavy tax because its competitor doing the same kind of business would not have to pay, merely because its owner did not own any other store.

In Eminence, Kentucky, the A. & P. operates a store at #4 Kings Block; this store is under my direct supervision. Its chief competitor is Friend-Berry. Both of these stores sell soft drinks, oleomargarine, cigarettes and eggs. The total special license tax which the store I supervise has to pay is $55.00, and the tax which the Friend-Berry store pays is about the same. The Friend-Berry is one-half block away from the store which I supervise; the business conducted by it is exactly the same as the business conducted in the A. & P. store; however, the tax on its sales would not be more than $25.00 and the exemption would be greater than the tax. As a result, the tax would only fall on the store which I supervise and not on the competitor of that store.

In Louisville, I supervise the store located at 3133 Portland Avenue. Mr. Fischer operates a store at 33rd & Portland Avenue. Mr. Fischer has no other store and the store operated by him is one of the chief competitors of the one which I supervise. Both stores have the same license tax, but the sales tax of the A. & P. store would be much larger, and, as a result, Fischer's sales tax would be entirely wiped out, whereas the A. & P. tax would be very large.

The stores which I have listed above are fair examples of the situation in regard to each one of the sixty-two stores which I supervise. In each case, the special license taxes are the same as the taxes of the competing stores. In each case, the competing stores have a volume of sales which is the same as the stores which I supervise. In some cases the competing stores have a larger volume of sales than the stores under my control, but, in each case, the com- [fol. 289] peting stores are owned by either a corporation or an individual that owns no other stores, and pays no tax, whereas each and every one under my supervision pays a large tax under the Gross Sales Statute. This is caused by the fact that the sales in every one of the A. & P. stores are added together in order to put A. & P. into higher bracket, and the only persons in the grocery business who would have to pay under the Gross Sales Statute

would be those who operate enough stores so as to make their aggregate sales over $400,000.00.

The tax on each A. & P. store would be about $566.00 and the deductions would amount to about $60.00. The effect of the tax is to impose a $500.00 burden which is not imposed on the competitors of the stores under my supervision. Such a tax would force the company to close almost all, if not all, its stores which I control; at least, I am practically certain that it would be impossible to operate these stores at a profit, if a tax is paid, at a fair rate for the capital invested.

Profits in my territory range from 1½% to 2½% on gross sales, and the 1% tax would take almost all of this profit. If the stores which I supervise were to be closed, the competitors would secure this business without being forced to pay this exorbitant tax, because each competitor would merely get the sales of a nearby A. & P. store and it would not be thrown into a higher bracket.

It would be impossible for these stores which I supervise to increase business and thereby increase profits, because an increase in business and in profits would be totally eaten up by the tax; besides this, it would be possible for our competitors to undersell us, thereby adding to their sales but not subjecting themselves to the tax.

For example, there is an A. & P. store in Elizabethtown, Kentucky. It does an annual business of about $60,000.00. The Hawkins Grocery, which competes with this store, does an annual business of about $40,000.00; it pays special privilege taxes of about $60.00, the same as the A. & P. store. By underselling A. & P. and accepting a smaller net profit of 1%, which Hawkins could do because of the heavy tax imposed on A. & P., he would be able to get the entire A. & P. business in Elizabethtown; he would then have [fol. 290] sales of $100,000.00, but he would have no tax to pay because his license tax would still offset the entire tax imposed under the Gross Sales Tax Law.

There is no monopoly in the grocery business. Every store we operate has one or more nearby competitors who would be glad to secure the business done by our stores. The stores which I supervise attempt to meet competition by accepting a small margin of profit and by efficient methods of merchandising. Many of our competitors have copied our attempt to supply the customer on the basis of

a small margin of profit although they own only one store. Many of the competitors of the stores which I supervise are members of coperative buying associations. These organizations purchase goods for all members of the cooperative association; they have common advertising; they employ people who visit the stores and recommend changes in much the same way as I supervise the stores under my control. These men advise them in regard to proper window displays and methods of selling, and they have uniform advertising prices. If the sales in all these stores which are members of the cooperative association would be aggregated and the tax imposed on this basis, each store would have a much higher tax to pay because the aggregate sales would place the store in the highest bracket; however, under the Kentucky Sales Tax Law, the members of the cooperatives, although using the same methods as many stores and selling goods in the same manner as goods are sold in my stores, do not have to pay any tax.

The method of adding together all of the sales in the case of the A. & P. stores has no connection with the manner in which the A. & P. organization operates the stores. Each store in the system is a separate unit; separate books are kept for each store; each store is charged with the goods it buys and each store is credited with the goods it sells. If the taxes which have to be paid are charged against each particular store and if the present tax is allowed, a $500.00 charge would be made against each store.

Chris Schumann.

Subscribed and sworn to before me this 5th day of January, 1931. Nadine McCreary, Notary Public. Notary Public, Jefferson County, Ky. My commission expires Aug. 11, 1931. (Seal of Nadine McCreary, Notary Public, Jefferson Co., Ky.)

[fol. 291]

EXHIBIT "A"

The Great Atlantic & Pacific Tea Company

Sup't Chris Schumann's Territory

City	Address	Principal independent competitors: Firm name	Principal independent competitors: Address	Estimated annual sales
Bardstown	Main Street	Stoker & Smith	Bardstown	60,000
Campbellsville	112 Main St	Hoskins Groc	Campbellsville	52,000
Carrollton	424 Main St	G. G. Woods	Carrollton	75,000
Elizabethtown	Irwin Block	Hawkins Groc	Elizabethtown	40,000
Eminence	#4 Kings Block	Friend & Berry	Eminence	50,000
LaGrange	121 Main St	W. T. Barr	LaGrange	35,000
Lebanon	119 Main St	B. & B. Service Store	Lebanon	78,000
Louisville	1215 S. 28th	Bloeman Grocery	28th & Dumesnil	52,000
"	2533 Portland	Fisher Bros	25th & High	52,000
"	1255 S. 18th	Kallbrier Groc	18th & Dumesnil	78,000
"	633 S. 26th	Dillman	26th & Magazine	36,400
"	2500 W. Market	Holman	24th & Jefferson	52,000
"	4130 W. Bdway	C. Durbin	41st & Chestnut	65,000
"	2100 W. Walnut	Charley's Market	22nd & Walnut	50,000
"	501 N. 17th St	Goffman	18th & Bank	52,000
"	3729 W. Broadway	A. Armig	38th & Chestnut	41,600
"	1801 W. Market	Wineberg	18th & Market	36,400
"	3133 Portland	Fischer	33rd & Portland	31,200
"	2146 Duncan	Fred Davis	22nd & Duncan	30,000
"	2239 W. Oak	Allen & Moore	22nd & Oak	62,500
"	2301 W. Broadway	Yutz Grocery	22nd & Maple	35,000
"	1501 S. 18th	Faust Groc	18th & Bolling	42,000
"	358 N. 26th St	Morris	20th & Slevin	33,800
"	1030 S. 28th	Gotton Groc	1015 S. 28th	40,000
"	3322 W. Broadway	F. Hohmann & Son	3401 W. Broadway	45,000
"	2901 Bank St	Davis Market	29th & Portland	60,000

EXHIBIT "A"—Continued

City	Address	Principal independent competitors		
		Firm name	Address	Estimated annual sales
Louisville	1901 W. Broadway	Madison Market	19th & Madison	50,000
"	2000 Bank St	Miller Bros	19th & Duncan	96,000
"	3401 W. Market	J. W. Pontrich	34th & Market	65,000
"	926 S. 18th St	NONE		
"	2600 W. Walnut	Prellis	27th & Walnut	25,000
"	1128 S. 32nd St	NONE		
"	2133 W. Market	Happell	22nd & Market	25,000
"	4301 W. Market	J. Becker	44th & Market	78,000
"	3402 W. Madison	Stietzletg Groc	34th & Chestnut	50,000
"	1031 Cecil Ave	F. Vertrees	40th & Greenwood	36,000
"	201 N. 26th	T. McShane	25th & Rowan	22,000
"	2201 W. Garland	Hoffman Groc	22nd & Garland	26,000
"	4103 W. Walnut	Riggies	41st & Cedar	35,000
"	1155 S. 18th St	NONE		
Shelbyville	540 Main St	B. B. Blakmore	Shelbyville	60,000
"	400 E. Main St	Hardesty Groc	Shelbyville	52,000
Springfield	Main St	McElroy & Sleader	Springfield	42,000

[fol. 292]

EXHIBIT "B"

The Great Atlantic & Pacific Tea Company

Sup't Chris Schumann's Territory

City	Address	Soft drinks	Oleo	State and county	Cigarettes	City grocery	City meat	Egg dealers	City and school	Miscellaneous	Total
Bardstown	Main Street	31.00	11.00	28.00	36.00	10.00	10.00	2.00	18.00	10.00 F.&V.	156
Campbellsville	112 Main St.	16.00	11.00	19.00	11.00	.....	.....	2.00	24.00	.....	83
Carrollton	424 Main St.	21.00	11.00	18.00	11.00	10.00	.....	2.00	24.00	.....	97
Elizabethtown	Irwin Block	6.00	11.00	26.00	36.00	.....	.....	2.00	48.00	.....	129
Eminence	#4 Kings Block	16.00	11.00	25.00	26.00	25.00	.....	2.00	12.00	.....	117
LaGrange	121 Main St.	11.00	11.00	39.00	11.00	10.00	.....	2.00	.....	.....	84
Lebanon	119 Main St.	12.00	11.00	64.00	62.00	.....	.....	2.00	77.00	.....	228
Louisville	1215 S. 28th	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	2533 Portland	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	1255 S. 18th St.	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	633 S. 26th St.	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	2500 W. Market	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	4130 W. Bdway	16.00	11.00	10.00	21.00	.....	25.00	.....	32.00	.....	115
"	2100 W. Walnut	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	501 N. 17th	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	3729 W. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1801 W. Market	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	3133 Portland	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2146 Duncan	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2239 W. Oak St.	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2301 W. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1501 S. 18th St.	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	358 N. 26th St.	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1030 S. 28th	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	3322 W. Broadway	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2901 Bank St.	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1901 W. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2000 Bank St.	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117

EXHIBIT "B"—Continued

City	Address	Soft drinks	Oleo	State and county	Cigarettes	City grocery	City meat	Egg dealers	City and school	Miscellaneous	Total
Louisville	3401 W. Market	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	926 S. 18th	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	2600 W. Walnut	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	1128 S. 32nd St.	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	2133 W. Market	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	4301 W. Market	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	3402 W. Madison	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	1031 Cecil Ave.	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	201 N. 26th St.	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	2201 W. Garland	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	4103 W. Walnut	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	1155 S. 18th St.	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
Shelbyville	540 Main	16.00	11.00	34.00	11.00	50.00	25.00	2.00	35.00	20.00 Fish	204
"	400 E. Main	16.00	11.00	26.00	11.00	40.00	25.00	2.00	35.00	.....	166
Springfield	Main St.	16.00	11.00	26.00	11.00	10.00	.....	2.00	26.00	.....	102

[fol. 293] AFFIDAVIT OF LOUIE J. JONES

STATE OF KENTUCKY,
County of Jefferson, ss:

Louie J. Jones, being first duly sworn deposes and says as follows:

I am thirty-one years old and live with my family in Louisville, Kentucky. Ever since I was eighteen years old, I have engaged in the grocery business, having served in the following capacities with the following companies; two years as clerk in a Quaker Maid store; as a manager two years in a Quaker Maid store; as a manager four years in an A. & P. store, and as an assistant superintendent four years with the A. & P. and one year as superintendent with the A. & P., totalling thirteen years.

As superintendent for the A. & P. stores, my duties consist of the following: I have charge of sixty-five stores situated in the extreme east end of the city of Louisville. I am responsible for the business done in each of them; I organize the sales force; I have charge of the installation of stock and it is part of my duties to see that the moneys received for the sale of stock is paid over to the company. I visit each store at least once in every three weeks and at that time I go over with the manager the business done during the preceding period and I check up sales and receipts for the three weeks preceding my visit.

I keep in close touch with competitive conditions and it is part of my duties to advise the company in the case I believe it would be for the best welfare of the company to expand in certain territories; for this reason I keep check on all competing stores in the neighborhood of the A. & P. stores which I supervise. Because of my familiarity with the stores I supervise, and because of my experience in the grocery business, I can estimate the sales of the competitors of A. & P., from their location; from the number of employees and from the general conditions of the store. A grocery store competes with other grocery stores in the neighborhood. The fact that an organization operates a store or a group of stores in another city has no effect on the stores which I supervise in Louisville. The competition for these stores is offered by the groceries which are within one block or on the opposite corner. Every one of

the stores under my supervision is in direct competition [fol. 294] with other stores which are carrying on the same kind of business as that conducted in any one of the A. & P. stores. The competitors sell the same merchandise and they have the same method of business—the only difference is that in my case I supervise a group of stores, whereas the majority of competitors, whether they are operated by an individual or a corporation, only own a single store.

These stores are located as shown in column one and two of the attached Exhibit which is labeled "Exhibit 'A'". The principal independent competitors who own and operate a single store are listed in columns three and four and the estimated sales of these independent competitors are listed in column five of Exhibit "A".

The sales of each of the Atlantic & Pacific stores which I supervise range between $40,000.00 and $70,000.00.

The sales of the following stores owned by competitors who do not own or manage any other store exceed the gross retail sales of the A. & P. store in the immediate vicinity. For example: Charles Deckel doing business at 2443 Bardstown Road has an annual business which I estimate at $182,000.00. The A. & P. store which I supervise located at Bardstown & Dundee is in direct competition with this particular store; its gross sales are at least $80,000.00 less than the gross sales of Mr. Deckel's store.

Julius Strauss doing business at 716 South 3rd has sales which exceed the sales of the neighboring A. & P. store which I supervise by about $200,000.00.

The Mammoth Grocery located at 2nd & Jefferson has double the amount of sales of the A. & P. store situated at 306 W. Jefferson.

K. Young, doing business at 2nd & Magnolia, has sales of about $350,000.00. This is approximately $300,000.00 more than the sales of the store I supervise at 1411 South 2nd Street which is in direct competition with Mr. Young's store.

The same is true of Grimms' Grocery located at 1482 South 7th Street which store competes with the A. & P. store located at 1508 South 7th Street, and this is also true in the case of store run by Ice & Violette which competes with the [fol. 295] A. & P. store at 314 Woodlawn Avenue.

Each of the above listed stores is owned by either a corporation or an individual who does not own or operate any other grocery store. Each of the above stores is selling goods which are similar to the goods sold in the competing

A. & P. Stores. The manner of doing business is the same except that our business is cash and carry while the competing stores do a credit and delivery business. Each of the stores competing with the A. & P. Stores pay the same license taxes to the State, because they all sell the same goods sold in the A. & P. stores. In each case, the total license taxes, when added up and deducted from the tax which is charged to the stores competing with A. & P., under the Gross Sales Tax, practically wipes out this tax.

In the case of the A. & P. stores which I supervise, the deductions would not wipe out the tax imposed under the Gross Sales Tax Statute, because the sales of every A. & P. store in the State of Kentucky are aggregated and the taxes imposed on this basis.

The grocery business is highly competitive and the imposition of a large tax on the A.&P. stores I supervise, without a similar tax on the competing stores would enable those stores to undersell A.&P. and thereby take away the business from the stores which I supervise; however, by taking away this business and adding to their sales, these stores would not increase the tax which they would have to pay because each store would merely be taking the business of a particular A. & P. store which is in the same locality and the total gross sales would still be below $400,000.00, and the tax on this sum would be erased by the deductions allowed.

On Exhibit "B", I have listed the A. & P. stores which I supervise and I have also listed the taxes which these stores have to pay. The average sales of the competitive stores which are owned by an individual or a corporation which do not own more than one store, is about $50,000.00, the same as the average for the A. & P. stores.

Almost every grocery in Louisville handles soft drinks, oleomargarine, cigarettes and eggs. They would all be entitled, therefore, to the same deductions. A store doing $35,000.00 worth of business such as Yeader's Grocery, Highland Park, would have a tax to pay of $17.50; under the Gross Sales Tax Law his deductible tax would be at least [fol. 296] $30.00, because he sells cigarettes, oleomargarine, soft drinks and eggs. As a result, Yeader would have no sales tax to pay. I supervise a store which is about a block away from Yeader's Grocery; its sales are around $50,000.00 but it would have a tax to pay because its sales would be aggregated with the sales of all the other A. & P. stores.

Mr. Goemer operates a store at the corner of Baxter & Hamilton; his sales are below $50,000.00 and are almost the same as the sales of the A. & P. store which I supervise located at 426 Baxter Avenue. These two stores are direct competitors. Under the Gross Sales Tax Law, Mr. Goemer would have no tax to pay but the tax on the competitive store which I supervise would be about $500.00.

I supervise a store at 1496 South Shelby; it has grocery sales of around $50,000.00 which is about the same as the sales of Ziegler's Grocery located at Shelby & Burnett. Ziegler's tax would be about $25.00. Both of these stores sell cigarettes, oleomargarine, eggs and soft drinks. As a result, the license tax Ziegler pays would allow him to deduct his entire tax. The tax on the store which I supervise, which is in direct competition with Ziegler's store, would be about $566.00; the deduction would amount to about $60.00 and, as a result, my store would have a $500.00 tax to pay.

The same is true in the case of all the stores which I supervise; in every case, the competitive store which is operated by an individual or a corporation having no other stores, would be excused from paying anything under the Gross Sales Tax, but the stores which I supervise would have to pay $500.00.

The reason for this is that The Great Atlantic & Pacific Tea Company has about thirteen million dollars ($13,000,000.00) worth of sales in the State of Kentucky. It operates 217 stores; every store in the State of Kentucky will pay nearly one per cent on its sales, making an average tax of about $566.00 as against nothing for competitors, except a limited and relatively few who own a large number of stores and have aggregate sales of over $400,000.

Profits from the store operations in my district average [fol. 297] between 1½% to 2% on gross sales. A $500 tax per store is oppressive and prohibitive. It is practically impossible to operate any store and secure a reasonable return for money invested and at the same time pay a $500 tax per store. It would be impossible to increase business and make a profit because the increased business would be subject to a one per cent tax which would eat up the entire profit. It would be impossible to open any new stores in my territory without paying one percent on all of the sales in the new store; however, any one of the persons operating a

single store which competes with the stores which I supervise could open new stores without paying any tax.

Many of the stores which I supervise are under long term leases. If the gross sales tax law is imposed, they could not be operated at a profit, and, if they would be closed, heavy losses would be involved. The stores which are competing with the stores that I supervise are not subject to any tax and, as a result, they can undersell A. & P. by accepting a profit which is one per cent lower than the profit we would have to accept because of the Gross Sales Tax Law. The increased business which these stores would get, as a result, would not be taxable.

Many of the stores competing with the stores that I supervise are now members of coperative associations. As a result, purchases are made by central headquarters; they can buy in quantity; they have common prices; men visit these stores much in the same manner as I visit the stores under my control and make recommendations in regard to show windows, selling points, and prices, therefore, these competitive stores have every advantage which the A. & P. stores have. There are a great many stores affiliated with cooperative associations in my district and I understand that if the gross sales of all these stores were aggregated, the tax which would be imposed would be about one per cent; however, as the act works out, there is no tax imposed on the competitors of A. & P.

Each store under my supervision is a separate unit in the A. & P. organization—separate books are kept. Each expense which a store incurs is allocated and charged against that store. Taxes and licenses are charged against the store. The same is true of purchases made by the store and money received is credited to each store.

[fol. 298] Louie J. Jones.

Subscribed and sworn to before me this 6th day of January, 1931. Nadine McCreary, Notary Public. Notary Public, Jefferson County, Ky. My commission expires Aug. 11, 1931. (Seal of Nadine McCreary, Notary Public, Jefferson Co., Ky.)

[fol. 299]

EXHIBIT "A"

The Great Atlantic & Pacific Tea Company
Sup't Louie J. Jones' Territory

City	Address	Principal Independent Competitors		Estimated annual sales
		Firm name	Address	
Louisville	1301 Bdstn. Rd.	Major Taylor	1305 Bdstn. Rd.	$260,000
"	1800 Frankfort	V. A. Schmitt	1577 Frankfort	39,000
"	2700 Frankfort	Hudsons Market	2720 Frankfort	83,200
"	1902 S. 3rd St.	H. G. Brooks	1800 S. 3rd St.	300,000
"	401 E. Broadway	Hornick	656 S. Preston	78,000
"	701 W. Broadway	Abraham	717 W. Broadway	31,200
"	1272 S. Preston	Snyders Grocery	Preston & Ormsby	36,400
"	3030 S. 4th St.	Mettars Grocery	4th & Central	62,400
"	904 S. Shelby	Wigginton Grocery	Shelby & Breck	52,000
"	1237 S. Shelby	Harsteins	Shelby & Shelby Pkway	52,000
"	801 E. Broadway	Raque	709 E. Broadway	78,000
"	844 E. Market	F. Hegan	901 E. Market	57,200
"	1552 Garland Ave.	Schuckman	16th & Kentucky	78,000
"	Bdstn. & Dundee	Chas. Deckel	2443 Bdstn. Rd.	182,000
"	1536 S. Fourth	NONE		
"	842 S. 1st St.	W. M. Dresel	712 S. 2nd St.	31,200
"	994 Barret Ave.	Ruffra Bros.	1400 Hepburn	57,200
"	2831 Taylor Blvd.	Young Groc.	2717 Montana	46,800
"	852 S. 3rd St.	Julius Strauss	716 S. 3rd St.	260,000
"	4518 Park Blvd.	Yeadens Grocery	Highland Park	31,200
"	306 W. Jefferson	Mammoth Grocery	2nd & Jefferson	104,000
"	1411 S. 2nd St.	K. Young Groc.	2nd & Magnolia	364,000
"	2255 Frankfort	Ed. L. Elinger	2257 Frankfort	44,200
"	1501 Story Ave.	Stacy	Story & Adams	52,000
"	426 Baxter Ave.	Goemer	Baxter & Hamilton	36,400
"	983 Goss Ave.	J. Hellman	Goss & Krieger	62,400
"	1508 S. 7th St.	Grimms Groc.	1482 S. 7th St.	104,000
"	314 Woodlawn	Ice & Violette	524 Woodlawn	104,000
"	701 Fehr Ave.	J. L. Moses	640 Fehr Ave.	26,000

"	3471 Taylor Blvd	G. W. Baker, Jr.	3450 Taylor Blvd		78,000
"	1501 W. Broadway	Newman	15th & Magazine		39,000
"	1496 S. Shelby	Zieglers	Shelby & Burnett		52,000
"	3764 S. Third St.	Sam Krietman	3115 S. 4th St.		62,400
"	2632 S. 4th St.	A. J. Schmitt	2700 S. 4th St.		93,600
"	201 W. Broadway	Groden	643 S. 2nd St.		36,400
"	2046 S. Preston St.	Goldstein	Preston & Barbee		41,600
"	1001 S. 5th St.	I. Krietman	1026 S. 5th St.		31,200
"	901 S. Preston	Jacobsons Grocery	Preston & Breck		46,800
"	1160 S. 1st St.	Altmans	First & Oak		31,200
"	613 W. Walnut St.	Eichel	511 S. 7th St.		36,400
"	1134 E. Breck	Schultz	Vine & Breck		31,200
"	2868 Frankfort	Roy H. Potts	329 Stilz Ave.		62,400
"	1449 S. Brook	NONE			
"	248 E. Market	Klein	Preston & Jefferson		312,000
"	944 E. Walnut	Geo. Scheibert	1001 E. Walnut		41,600
"	1912 Bdstn. Rd.	Habig	Richmond Dr. & Bdstn		52,000
"	1614 Bdstn Rd.	Heckman's Groc.	1514 Bdstn Rd.		57,200
"	625 Baxter Ave.	Joseph	Baxter & Rogers		46,800
"	971½ Baxter Ave.	Scheifers	Baxter & Highland		52,000
"	4101 S. Preston	Bergenroths	Camp Taylor		26,000
"	1032 W. Market	Sam Baron	1002 W. Market		26,000
[fol. 300]					
Louisville	1232 W. Walnut St.	P. Rheinhard	1234 W. Walnut		36,400
"	1429 W. Market	Simpson	15th & Jefferson		20,800
"	605 W. Oak Street	Ben Bass	1158 S. 7th St.		78,000
"	801 S. 6th St.	H. S. Cohen	800 S. 6th St.		31,200
St. Matthews		Roby & Clemens	St. Matthews		93,600
Louisville	1001 E. Oak St.	Baynes Groc.	Swan & Oak Sts.		52,000
"	1101 E. Burnett	Zieglers	Hickory & Burnett		52,000
"	1600 W. Oak St.	Hoffman	1514 W. Oak St.		18,200
"	733 S. Brook St.	Wm. Mehl	Brook & Jacob		15,600
"	438 E. Atwood	Barnes	Jackson & Atwood		44,200
"	203 W. Walnut St.	Schindler	2nd & Walnut		15,600
"	4401 Park Blvd.	Beisler	Highland Park		41,600
"	4204 Taylor Blvd.	G. Walker & Son	4231 Taylor Blvd.		78,000
Shively	18th St. Road	E. W. Kiroy	St. Helens		52,000

[fol. 301]

EXHIBIT "B"

The Great Atlantic & Pacific Tea Company

Sup't Louie J. Jones' Territory

City	Street address	Soft drinks	Oleo	State and county	Cigarettes	City grocery	City meat	Egg dealers	City and school	Miscellaneous	Total
Louisville	1301 Bardstown	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	1800 Frankfort	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	2700 Frankfort	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	1902 S. 3rd	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	401 E. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	701 W. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	1272 S. Preston	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	3030 S. Fourth	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	904 S. Shelby	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	1237 S. Shelby	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	801 E. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	844 E. Market	16.00	11.00	11.00	21.00	.....	25.00	.....	31.00	.....	115
"	1552 Garland	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	Bdstn. & Dundee	16.00	11.00	10.00	21.00	.....	25.00	.....	31.00	.....	117
"	1536 S. Fourth	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	114
"	842 S. First	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	994 Barret	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2831 Taylor Bl	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	117
"	852 S. 3rd St	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	116
"	4518 Park Blv	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	306 W. Jeff	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1411 S. 2nd	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2255 Frankfort	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1501 Story	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	426 Baxter	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	983 Goss Ave	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1508 S. 7th St	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	314 Woodlawn	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	701 Fehr Ave	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117

.....3471 Taylor Bl.....	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
.....1501 W. Bdway.....	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
.....1496 S. Shelby.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....3764 S. 3rd St.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....2632 S. 4th.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....201 W. Bdway.....	16.00	11.00	12.00	11.00	.....	35.00	.....	31.00	.....	116
.....2046 S. Prestn.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....1001 S. 5th.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....901 S. Preston.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....1160 S. 1st.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....613 W. Walnut.....	16.00	11.00	12.00	21.00	.....	.....	.....	31.00	.....	91
.....1134 E. Breck.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....2868 Frankfort.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....1449 S. Brook.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....248 E. Market.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....944 E. Walnut.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....1912 Bardstown	16.00	11.00	12.00	21.00	.....	25.99	.....	31.00	.....	116
.....1614 Bardstown.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....625 Baxter.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....971½ Baxter.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....4101 S. Preston.....	10.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	110
.....1032 W. Market.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....1232 W. Walnut.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....1429 W. Market.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....605 W. Oak.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....801 S. 6th.....	16.00	11.00	12.00	21.00	.....	25.90	.....	31.00	.....	116
.....St. Matthews.....	16.00	11.00	12.00	11.00	.....	.....	.....	31.00	.....	71
.....1001 E. Oak.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....1101 E. Burnett.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....1600 W. Oak.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....733 S. Brook.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....438 E. Atwood.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....203 W. Walnut.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....4401 Park Blvd.....	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....4204 Taylor."	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
.....Shively.....	6.00	11.00	12.00	11.00	.....	.....	.....	31.00	.....	71

[fol. 302] AFFIDAVIT OF BRACK M. FERRILL

STATE OF KENTUCKY,
County of Jefferson, ss:

Brack M. Ferrill being first duly sworn deposes and says as follows:

I am thirty-six years of age and live in Evansville, Indiana. I have been in the grocery business for eleven years and during that period I was associated with Quaker Maid, Inc., and The Great Atlantic & Pacific Tea Company. I started in as a store manager, then I was assistant superintendent of several stores, and for the last three years I have been superintendent of a district comprising certain Kentucky stores. There are sixty-six stores under my control and supervision in this district of which eighteen stores are situated in Kentucky.

My duties as superintendent require that I visit each of the stores under my supervision approximately once a month. I am familiar with the retailing of groceries in the territory under my supervision; with the affiliation of the grocery stores which are competing with the stores operated by The Great Atlantic & Pacific Tea Co.; with the character of the merchandise carried by competing merchants; with the number of clerks employed and its competing merchants and the general competitive conditions in the whole territory.

It is part of my duties to recommend to the central office any need for expansion in the territory and I inform the Company of the advisability of opening up new stores. I am familiar with the taxes which are assessed against each store and which are paid by both the Altantic & Pacific Stores and by the stores operated by competitors.

There is listed on Exhibit "A" attached hereto and made a part hereof in columns 1 and 2 the stores operated by The Great Atlantic & Pacific Tea Co., which are under my [fol. 303] supervision. On the same line as each store there is listed in column (3) the independent store or stores which competes with the Atlantic & Pacific Store. These stores are owned by individuals or corporations, who to my knowledge do not own or operate other stores. The addresses of these competing stores are listed in column (4)

of Exhibit "A", and the estimated annual sales of each competitive store is listed in column (5).

The average annual sales of each of the Atlantic & Pacific Stores under my supervision is approximately $50,000.00.

The sales of the following stores owned by competitors who do not own or manage any other store to the best of my belief exceed the gross retail sales of the Atlantic & Pacific store in same locality:

Central City

Firm	Street	Approx. gross sales
Atlantic & Pacific Store	109 Broad St.	$80,000
Ruby's	Same block	130,000

Glasgow

Atlantic & Pac. Store	Green & Main Sts.	70,000
H. Cherry	Same block	100,000

Owensboro

Atlantic & Pac. Store	120 E. 2nd St.	60,000
Thomas Bader	434 W. 4th St.	150,000

Princeton

Atlantic & Pac. Store	123 W. Main St.	50,000
A. Kalinsky	Half block away	80,000

In every case the Atlantic & Pacific Stores and competitors are similar; they are selling the same class of goods to the same public.

There is no monopoly in grocery business in the district over which I have supervision. There are a great number of stores and the field is highly competitive. The Atlantic [fol. 304] & Pacific stores are subject to the same taxes as the stores of those competitors similarly situated. On Exhibit "B" there is listed the taxes which each Atlantic & Pacific store under my supervision pays.

The average sales of the competitive stores owned by individuals or corporations which do not own more than one store do not average in excess of about $50,000.00.

Fifty per cent of all the competitors who operate only a single store in my opinion do not average more than

$25,000.00 gross sales per year. At present the tax paid by these grocery stores exceeds sales tax and as a result the reductions which they are allowed to take would entirely offset the sales tax.

The Atlantic & Pacific Stores under my supervision sell Oleomargarine, Cigarettes, Soft Drinks and Candled Eggs. They pay $11.00 for the right to sell Oleomargarine; $11.00 for the right to sell Cigarettes and $2.00 as a license for candling eggs. Most of the stores competing with the Atlantic & Pacific stores under my supervision sell Oleomargarine, Soft Drinks and Cigarettes and many of them candle Eggs.

The deductable tax, therefore, in each case is the same; however, the tax levied on the Atlantic & Pacific stores is much higher because the sales of all Atlantic & Pacific stores in the State of Kentucky are added together, thus putting each store in a higher bracket and making them subject to a one per cent tax. Each Competitor, however, who operates only a single store is taxed on the sales in that store and as a result he only pays 1/20 of 1%. This tax is completely offset by the deductions he is allowed to take. For example, the White Front Grocery Co., operates a grocery store in Henderson, Ky., and no other stores, as far as I know, are owned or operated by this same person who runs this particular store. The gross sales in the case [fol. 305] of the White Front Grocery Co., are about $50,000.00 a year. Figuring this tax on 1/20 of 1%, the operator of this store has a tax of $25.00; however if he sells Oleomargarine, cigarettes and candles eggs on which he pays a license tax of $24.00 he has no tax to pay. On the other hand, Atlantic & Pacific operates a store at 312 First St., in Henderson, Ky., which competes directly with the White Front Grocery Co. This store has the same special license fees. but the deduction would not affect the tax because the tax on the A. & P. store would be about $560.00 and after the deduction we would still have to pay about $500.00. This is caused by the fact that the sales on this particular store are added to the sales of all other Atlantic & Pacific Stores in the State of Kentucky. As a result we would have to pay 1% on our sales, whereas the White Front Grocery Co., only pays 1/20 of 1% on its sales. The method of conducting business in the case of the

White Front Grocery Co., is practically identical to the method which is used in the Atlantic & Pacific Store; public served by each of them is the same. Gross sales in each store is about the same, but in the one case we pay a $500.00 tax, whereas they pay nothing.

Profits from store operations in the district over which I have supervision average about 1½ to 2½%. A 1% tax on gross sales would take between ⅔ to ½ of this profit. A $500.00 tax on each store is prohibitive and confiscatory. It would be impossible to increase business and make additional profit because practically all of the increased profit would be taken by the tax. It would be impossible to open new stores in my district in the cities in which stores are located at the present time because the profits from each store would be swallowed up by the tax. However, competitors who are taxed on 1/20 of 1% could open new [fol. 306] stores without paying any tax. Competitors not subject to the tax would be able to undersell the Atlantic & Pacific by accepting a smaller profit but they would not have to pay 1% tax on this increased business. Some of the stores under my supervision are leased from the owners under long term leases and to abandon these stores would involve considerable loss.

Many of the individuals operating stores which compete with Atlantic & Pacific, who do not own any other store are members of co-operative associations. In that portion of Kentucky in which I have supervision United Merchants Association known as the Urma Stores and Independent Grocers Alliance known as I. G. A. are the leading co-operative associations. Members of these co-operative associations receive the benefits of mass buying, mass merchandising and common advertising. The salesmen sent out by Independent Grocers Alliance and by United Retail Grocers Association advise the members in regard to uniform store windows, advertising displays and other questions arising in regard to the retailing of merchandise. This is similar to the service rendered by supervisors of stores in the Atlantic & Pacific organization. I believe that if the sales of all the members of each separate co-operative were aggregated each member of the association would have to pay the higher tax; however, under the Kentucky Sales Tax Law each member of the cooperative comes in

the bracket; as a result he has a low rate of taxation. On the other hand, the Atlantic & Pacific Stores are taxed 1%.

Each Atlantic & Pacific store under my supervision is a separate unit, under a manager whose salary is based on the amount of sales of his particular store. Separate records are kept for each store. The taxes levied each store are charged against that store. Each store is charged with goods purchased by it and credited with the sales which it makes.

[fol. 307] Brack M. Ferrill.

Subscribed and sworn to before me this 6th day of January, 1931. Nadine McCreary, Notary Public. Notary Public, Jefferson County, Ky. My commission expires Aug. 11, 1931. (Seal of Nadine McCreary, Notary Public, Jefferson Co., Ky.)

[fol. 308]

EXHIBIT "A"

The Great Atlantic & Pacific Tea Company

Sup't Brack M. Ferrill's Territory

City	Address	Principal Independent Competitors		Estimated annual sales
		Firm name	Address	
Bowling Green	939 State St.	None	None	.....
Bowling Green	216 Main St.	Thomas Bros.	Bowling Green	$104,000
Central City	109 Broad St.	Ruby's	Central City	130,000
Franklin	406 Depot St.	F. M. Ruder	Franklin	78,000
Glasgow	Green & Main St.	H. Cherry	Glasgow	104,000
Greenville	109 W. Main	Star Market	Greenville	62,400
Henderson	312 First St.	White Front Gro. Co.	Henderson	45,000
Hopkinsville	123 Ninth St.	Walker	Hopkinsville	62,400
Horse Cave	S. S. Main St.	Stuart	Horse Cave	41,600
Madisonville	132 S. Main St.	McGary & Butler	Madisonville	41,600
Morganfield	Court St.	Waggener Grocery Co.	Morganfield	52,000
Owensboro	120 E. 2nd St.	Thomas Bader	Owensboro	100,000
Owensboro	1006 E. 4th St.	R. Bratcher	Owensboro	52,000
Owensboro	225 W. 2nd St.	Frederica Market	Owensboro	80,000
Princeton	123 W. Main St.	A. Kolinsky	Princeton	78,000
Providence	109 Broadway	A. Niswoner	Providence	104,000
Russellville	123 N. Main St.	Cooksey	Russellville	62,400

[fol. 309]

EXHIBIT "B"

The Great Atlantic & Pacific Tea Company

Sup't Brack M. Ferrill's Territory

City	Street address	Soft drinks	Oleo	State and county	Cigarettes	City grocery	City meat	Egg dealers	City and school	Miscellaneous	Total
Bowling Green	939 State	12.00	11.00	7.00	22.00	14.00	.....	2.00	31.00	.....	99
Bowling Green	216 Main	12.00	11.00	9.00	22.00	14.00	.....	2.00	31.00	.....	101
Central City	109 Broad	6.00	11.00	35.00	11.00	15.00	.....	2.00	102.00	.....	182
Franklin	406 Depot	6.00	11.00	19.00	11.00	.....	.....	2.00	39.00	.....	88
Glasgow	Green & Main	12.00	11.00	.....	26.00	10.00	.....	2.00	25.00	.....	86
Greenville	109 N. Main	6.00	11.00	63.00	36.00	5.00	5.00	2.00	45.00	.....	173
Henderson	312 First	16.00	11.00	13.00	21.00	20.00	.....	2.00	45.00	.....	128
Hopkinsville	123 Ninth	12.00	11.00	22.00	22.00	24.00	35.00	2.00	36.00	.....	164
Horse Cave	S. S. Main	6.00	11.09	17.00	11.00	17.00	.....	2.00	.....	.....	64
Madisonville	132 S. Main	12.00	11.00	21.00	22.00	.....	.....	2.00	23.00	15.00 Butter	106
Morganfield	Court St.	6.00	11.00	39.00	11.00	.....	.....	2.00	48.00	.....	117
Owensboro	120 E. 2nd	11.00	11.00	.....	11.00	10.00	.....	2.00	.....	.....	45
Owensboro	1006 E. 4th	11.00	11.00	13.00	11.00	10.00	.....	2.00	35.00	.....	93
Owensboro	225 W. 2nd	11.00	11.00	25.00	11.00	10.00	.....	2.00	35.00	.....	105
Princeton	123 W. Main	11.00	11.00	42.00	11.00	.....	10.00	2.00	.....	.....	87
Providence	109 Broadway	6.00	11.00	30.00	11.00	.....	.....	2.00	37.00	.....	97
Russellville	123 N. Main	6.00	11.00	.....	11.00	.....	.....	2.00	.....	.....	30

[fol. 310] AFFIDAVIT OF ALBERT C. HUNEKE

STATE OF OHIO,
County of Hamilton, ss:

Albert C. Huneke, being first duly sworn, deposes and says:

My name is Albert C. Huneke. I am 57 years of age and I live in Cincinnati, Ohio. I am Manager of the Cincinnati Packing House, owned and operated by The Kroger Grocery & Baking Company. This packing house is situated on the northeast corner of Bank & Winchell Streets. I have charge of all operations conducted at this plant, and all work is done under my direct supervision.

I am acquainted with the receiving, slaughtering, preparation and shipping of all products handled at this plant.

Shipments to this packing plant from various vendors are segregated upon delivery and they are kept apart at all times. We receive cattle, poultry, hogs and sheep from the Kroger Farm, which is located on the Louisville Pike near Cleves, Ohio, in the State of Ohio. As soon as any animal received from Kroger is killed, it is marked with a stamp, of which the following is a facsimile:

THE KROGER GROCERY
FARM PRODUCT
AND BAKING CO.

Poultry is marked on the leg with the following stamp:



[fol. 311] Upon being slaughtered, all products are kept in the chill room. They are then shipped to Kroger stores where they are sold at retail. Beef is delivered in trucks without being wrapped, and it is sold in exactly the same condition that it is shipped, except that the clerk or manager of the store cuts it into smaller portions. This is true of beef which is shipped from Ohio to our Kentucky stores, that is, the beef is sold in the same condition it is in when being transported across the state line.

Some of the products derived from animals received from the Kroger Farm are sent to the Kentucky stores operated by The Kroger Grocery & Baking Company, where they are sold at retail.

Albert C. Huneke.

Sworn to before me and subscribed in my presence this 27 day of January, 1931. Harry Kasfir, Notary Public, Hamilton County, Ohio. (Notarial seal of Harry Kasfir, Hamilton County, Ohio.)

[fol. 312] AFFIDAVIT OF WALTER WENDEROTH

STATE OF OHIO,
Hamilton County, ss:

Walter Wenderoth, being first duly sworn, deposes and says as follows:

My name is Walter Wenderoth. I am 44 years old, and I live with my family in Bellevue, Kentucky. I am associated with The Kroger Grocery & Baking Company, in the capacity of Meat Superintendent for its stores located in Campbell and Kenton Counties and the neighboring vicinity.

As Meat Superintendent, I have charge of the Meat Departments in each of the Kroger stores, and I am familiar with the stock carried and the sales made.

The Kroger stores under my supervision are supplied with meats and poultry by the Cincinnati Packing House of The Kroger Grocery & Baking Company. They are also supplied with products which we purchase from C. Rice and Joe Rice, who operate packing plants in Kentucky. We also purchase meats from Armour & Co. and Swift & Co., which is sold in the Kentucky stores.

Among the products received from the Cincinnati Packing House of the Kroger Grocery & Baking Company are some which are derived from animals raised at the Kroger Farm, and these products are sold at retail in the Kentucky stores under my supervision.

The Meat Departments in each of the Kroger stores are entirely distinct from the Grocery branch of the business. Each meat store competes with the neighboring meat stores and it is not affected by neighboring groceries who do not sell meat. Many of the neighboring meat stores compete directly with the Kroger meat stores, which are owned and operated by individuals, partnerships or corporations, who do not own or operate any other store in the [fol. 313] state of Kentucky, and many of these singly owned stores are larger and have greater sales than the competing Kroger stores. For example: Frank Trik on Monmouth Street in Newport, has greater sales in meat than the Kroger store across the street. Trik also handles oleomarg-ine and the State License which he pays would relieve him from the obligation of paying any tax under the Gross Sales Tax Law of Kentucky. The Meat Department in the Kroger store which is across the street would have a One (1%) per cent tax to pay.

Beckers Brothers Company, operating a meat store on Monmouth Street in Newport, also outsell the Kroger store which is in the neighborhood. Although this Kroger store is only a square away and the meat it sells does not differ from the meat sold in Becker Brothers Company store, its sales would be subject to a One (1%) per cent tax. The Becker store on the other hand, would only have to pay One-twentieth (1/20th) of One (1%) per cent, because their sales do not exceed $400,000, and in fact they are much lower. The sales in the competing Kroger store are very much below $400,000, but the sales are combined with the sales in all other Kroger stores, whether they are sales of meats or groceries, and the aggregate sales are taxed One (1%) per cent.

We endeavor as a general rule, to make about Two (2%) per cent profit per dollar of sale, and the assessment of a One (1%) per cent tax would deprive us of about Fifty (50%) per cent of this profit. Such a tax is exorbitant and confiscatory, and would make it unprofitable to operate the Meat Departments under my supervision. In the event

we would increase our sales or in -he event we opened new Meat Departments in Kroger Stores, we would be subjected to a One (1%) per cent tax. Our competitors, however, could increase their sales or open new meat stores in the neighborhood of Kroger stores without subjecting them-
[fol. 314] selves to more than a tax of One Twentieth (1/20th) of One (1%) per cent.

Walter Wenderoth.

Sworn to before me and subscribed in my presence this 28th day of January, 1931. Harry Kasfir, Notary Public, Hamilton County, Ohio. (Notarial seal of Harry Kasfir, Hamilton County, Ohio.)

[fol. 315] AFFIDAVIT OF FRANCIS BALLARD

STATE OF KENTUCKY,
County of Kenton, ss:

Francis Ballard, being first duly sworn, deposes and says as follows:

My name is Francis Ballard, and I live at 2316 Greenup St., Cov., Ky.

I am the Manager of the Meat Department in Store #658, operated by The Kroger Grocery & Baking Company, at 1253 Highway, Covington, Kentucky, and my duties consist of the management of my department and the selling of meats to the public at retail.

We receive meat which we sell at this store from Armour and Swift in Chicago, and from The Cincinnati Packing House, Bank & Winchell Streets, Cincinnati, Ohio, which is owned by The Kroger Grocery & Baking Company. We have received meat and poultry from the Cincinnati Packing House which was derived from animals raised on the Kroger Farm. All of these products have a special stamp which reads: "The Kroger Grocery & Baking Company—Farm Product."

These products have been sold at retail to the general public in my store by myself and by my clerks.

Francis Ballard.

Sworn to before me and subscribed in my presence this 27 day of January, 1931. John Weisenberger, Notary Public, Kenton County, Ky. My commission expires April 18th, 1932. (Seal of J. Weisenberger, Notary Public, Kenton County, Kentucky.)

[fol. 316] AFFIDAVIT OF RUFUS BLUME

STATE OF OHIO,
County of Hamilton, ss:

Rufus Blume, being first duly sworn, makes the following statement under oath:

My name is Rufus Blume, I am 54 years of age and live in Cincinnati, Ohio.

I am employed by the Kroger Grocery & Baking Company in the capacity of Superintendent of the Dairy plant operated by Kroger on Florence Avenue, Cincinnati, Ohio. All the work done at this plant in regard to the receiving, treating and shipment of milk and creamery products is under my direct supervision.

The Kroger Grocery & Baking Company purchases milk from farmers in the vicinity of the City of Cincinnati, and this milk is collected by milk route operators who bring it to the dairy plant on Florence Avenue in Cincinnati, Ohio. The containers of each farmer bear special identification marks in order that each vendor may be properly charged with the credits due him after the milk received is weighed.

In addition to receiving milk from farmers who sell to The Kroger Grocery & Baking Company, we also receive milk at the dairy plant from the farm which is conducted by The Kroger Grocery & Baking Company on the Louisville Pike, near Cleves, Ohio. This milk is brought in by O. W. Vaughn, who operates Route #800.

After the milk is received, it goes through the process of Pasteurization, and this is done in the most hygienic and approved fashion. Once the milk is poured into the vats, it goes through the whole process of Pasteurization automatically, and it is even bottled mechanically. The bottled milk is delivered in Kroger trucks to the various

[fol. 317] stores which the company operates in this vicinity, where it is sold at retail. We make deliveries from this plant to the stores operated by Kroger in the cities of Covington, Newport and Bellevue, Ky., and the stores in the neighboring territory. Our milk is sold in the same bottles that leaves the Kroger plant, and milk sold at retail in the Kentucky stores is in the same bottle that was used to transfer it from Ohio to Kentucky.

The milk which we receive from the farm conducted by The Kroger Grocery & Baking Company is poured into a special vat and it is bottled separately. Some of this milk is shipped to Kroger stores in the State of Kentucky, and it is there sold at retail.

R. B. Blume.

Sworn to before me and subscribed in my presence this 23 day of January, 1931. Harry Kasfir. (Notarial seal of Harry Kasfir, Hamilton County, Ohio.

[fol. 318] AFFIDAVIT OF O. W. VAUGHN

STATE OF OHIO,
County of Hamilton, ss:

O. W. Vaughn, being first duly sworn, deposes and says as follows:

My name is O. W. Vaughn, and I live at Guilford, Indiana. I conduct what is called a "milk route" and my work consists of the collecting of milk from the various farmers in territory which I cover, and the delivery of that milk at the dairy plant of The Kroger Grocery & Baking Company on Florence Avenue, Cincinnati, Ohio.

My route takes in a radius of about twenty miles around Guilford, Indiana. This includes the territory surrounding Cleves, Ohio.

I collect milk from the farm conducted by The Kroger Grocery & Baking Company on the Louisville Pike near Cleves, Ohio, and I deliver that milk at the dairy plant conducted by The Kroger Grocery & Baking Company, Florence Avenue, Cincinnati, Ohio.

The cans of different farmers bear special identification marks, and each farmer is credited with the milk that I deliver at the Kroger plant after the same is weighed.

O. W. Vaughn.

Sworn to before me and subscribed in my presence this 23 day of January, 1931. Harry Kasfir. (Notarial Seal of Harry Kasfir, Hamilton County, Ohio.)

[fol. 319] AFFIDAVIT OF JOHN C. SCHWARZ

STATE OF KENTUCKY,
County of Jefferson, ss:

John C. Schwarz, being first duly sworn, makes the following statement under oath:

My name is John C. Schwarz and I live in Louisville, Ky. I am Treasurer of Gray-Von Allmen Sanitary Milk Co., a corporation organized under the law- of Delaware.

The Gray-Von Allmen Sanitary Milk Co. produces milk and sells it at retail in the City of Louisville and in the surrounding territory. The Gray-Von Allmen Sanitary Milk Co. maintains an establishment at the corner Oak St. and Garvin Place, Louisville, Ky. at which establishment milk is sold at retail to the general public.

The Gray-Von Allmen Sanitary Milk Co. owns and operates a dairy farm at LaGrange Kentucky and it produces milk at this farm which is sold at retail. A portion of the milk produced on this farm is sold at retail at the establishment maintained by the company for the retail sale of milk at the corner Oak and Garvin Place, Louisville, Kentucky.

The Gray-Von Allmen Sanitary Milk Co. is, therefore, actually engaged in farming and selling farm products raised by them in this State and by reason thereof it comes within the exception provided for in Clause One of the Kentucky Gross Sales Tax Law and is exempted under the terms of the Act.

(Signed) John C. Schwarz.

Sworn to before me this 19 day of January, 1931. Adeline L. Lauer, Notary Public. My commission expires Dec. 30, 1931. (Seal of Adeline L. Lauer, Notary Public, Louisville, Ky.)

[fol. 320] AFFIDAVIT OF ERNEST THOMPSON

STATE OF KENTUCKY,
County of Fayette, ss:

Ernest Thompson, being first duly sworn, deposes and says that he is Chief of Police, of the City of Lexington, State of Kentucky, and that in his opinion, the operation of a group of stores by a retail merchant does not increase the fire or police hazards, except in an arithmetical ratio.

Further affiant sayeth not.

Ernest Thompson.

[Duly verified.]

[fol. 321] AFFIDAVIT OF M. R. ANDERSON

STATE OF KENTUCKY,
County of Fayette, ss:

M. R. Anderson, being first duly sworn, deposes and says that he is Safety Director, of the City of Lexington, State of Kentucky, and that in his opinion, the operation of a group of stores by a retail merchant does not increase the fire or police hazards, except in an arithmetical ratio.

Further affiant sayeth not.

M. R. Anderson.

[Duly verified.]

[fol. 322] AFFIDAVIT OF C. J. HENRY

STATE OF KENTUCKY,
County of Fayette, ss:

C. J. Henry, being first duly sworn, deposes and says that he is Chief of the Fire Department, of the City of Lexington, State of Kentucky, and that in his opinion, the operation of a group of stores by a retail merchant does not increase the fire or police hazards except in an arithmetical ratio.

Further affiant sayeth not.

C. J. Henry.

[Duly verified.]

[fol. 323] AFFIDAVIT OF HARMON NOE

STATE OF KENTUCKY,
County of Harlan, ss:

I, Harmon Noe, being first duly sworn, deposes and says that he is Chief of Police, of the City of Harlan, State of Kentucky, and that in his opinion, the operation of a group of stores by a retail merchant does not increase the fire or police hazards, except in an arithmetical ratio.

Further affiant sayeth not.

Harmon Noe,
Chief of Police.

[Duly verified.]

[fol. 324] AFFIDAVIT OF R. W. OWENS

STATE OF KENTUCKY,
County of Perry, ss:

R. W. Owens, being first duly sworn, deposes and says that he is Chief of Hazard Fire Department, of the City of Hazard, State of Kentucky, and that in his opinion, the operation of a group of stores by a retail merchant does not increase the fire or police hazards, except in an arithmetical ratio.

Further affiant sayeth not.

R. W. Owens.

[Duly verified.]

[fol. 325] AFFIDAVIT OF CRAWFORD LEE

STATE OF KENTUCKY,
County of Franklin, ss:

Crawford Lee, being first duly sworn, deposes and says that he is Chief of Police, of the City of Frankfort, State of Kentucky, and that in his opinion, the operation of a group of stores by a retail merchant does not increase the fire or police hazards, except in an arithmetical ratio.

Further affiant sayeth not.

Crawford Lee.

[Duly verified.]

[fol. 326] AFFIDAVIT OF G. H. PARKER, MANAGER, KENTUCKY ACTUARIAL BUREAU

JEFFERSON COUNTY,
State of Kentucky, ss:

Affiant, G. H. Parker, states that he is the managter and officer actively in charge of the business of the Kentucky Actuarial Bureau; that one of the functions of said Bureau is the determination of fire insurance rates on property insured against fire in the State of Kentucky; that said Bureau fixes or approves fire insurance premium rates throughout the entire State of Kentucky, and that affiant is familiar with the factors entering into the determination of the various rates fixed.

Affiant states that under the Kentucky Insurance Laws no rating bureau shall fix any fire insurance rate which discriminates unfairly between the risks of essentially the same hazard and having substantially the same degree of protection against fire. The rates as fixed by the Kentucky Actuarial Bureau are based upon the potential fire hazard in each individual risk in accordance with the requirements of the Kentucky Statutes and the fact that a particular store is owned by or leased to a corporation, partnership or individual owning or operating more than one store has no bearing on the premium rate for fire insurance on such building, or in any way affects the fire hazard.

[fol. 327] Affiant states that, in his opinion, the fact that one owner owns or operates more than one store or more than one department in a single store does not affect the fire hazard in any way, as to any particular store.

G. H. Parker.

Subscribed and sworn to before me by G. H. Parker this 13 day of January, 1931. My commission expires this 21 day of January, 1931. William E. Clark, Notary Public, Jefferson County, Kentucky. (Seal.)

[fol. 328] Louisville

AFFIDAVIT OF ROBERT J. MCKIM

STATE OF KENTUCKY,
County of Jefferson, ss:

Robert J. McKim, being first duly sworn, states:

1. I am thirty-five years of age and I am the President and chief officer of the Stewart Dry Goods Company (hereinafter called Stewarts), a corporation organized under the laws of the State of Kentucky with its principal office and place of business in Louisville, Kentucky. I have been President of Stewarts since March 10, 1930, and prior to assuming that position I have been in the retail dry goods and department store business for sixteen years. Before entering this business I was a student at Tulane University. By virtue of my position and experience in the dry goods and department store business I am familiar with the methods customarily employed in conducting said business and with the general retail situation in the City of Louisville. By virtue of said fact and by making comparison with the sales of our own store, of which I have personal knowledge, I am qualified to estimate the approximate gross annual sales of other stores in the City of Louisville. I am familiar with the location and type of all of the larger retail stores in Louisville, and I have had an opportunity to and I have observed the nature, extent and character of their business. [fol. 329] I am likewise acquainted with many of the smaller establishments, and I have made a survey of the City and consulted with various department managers, buyers and executive officers of Stewarts with a view to fortifying my information in regard to the stores hereinafter referred to.

2. There are seventy separate departments in Stewarts, each of which is charged in bookkeeping with its own floor space, advertising, payroll, taxes and other items of overhead as though they were so many separate and distinct stores. Each department is in practice, and in fact, a separate unit, distinct from the other departments in Stewarts. The figures for the various departments are continually examined and analyzed with a view to improving our business methods and our service to our customers, as well as

to determine whether or not a particular department is, or is not, profitable. The continuance, enlargement or contraction of a department is determined by its showing, as indicated. For example, for many years Stewarts handled linoleum in a distinct department. After several years of unprofitable business in that department it was entirely discontinued in December, 1928, and has not since that time been handled.

The annual sales do not exceed $400,000.00 in any single department; the maximum sales of any one department in Stewarts is approximately $250,000.00.

3. In many instances the sales of particular departments in Stewarts are approximately the same as the sales of one or more specialized stores selling the same line of goods, [fol. 330] and in many instances the sales of a particular department in Stewarts will be considerably less than the sales of specialized stores competing with Stewarts in the particular line of goods handled.

As a basis for the survey which I have made, as mentioned above, I have made use of the classified section of the 1930 City Directory of the City of Louisville, supplemented by the last classified Telephone Directory, together with my personal knowledge and the knowledge of the various department managers with whom I have consulted with a view to presenting wherever possible the entire field of competition with the specific departments mentioned, showing the discrimination against Stewarts, and other stores similarly situated, and in favor of specialized stores competing with only one or more departments in Stewarts which results from the threatened tax levied under the 1930 Kentucky Sales Tax Law. It is not practicable to list all of the stores competing with each individual department in Stewarts for the reason that the directories, naturally, do not have the same classification in each instance which we make of our departments. Therefore, I have carefully examined the classifications made by the City Directory and in every instance reasonably possible I have listed all of the stores competing with us. This results in a classification of about ten different kinds of competition, thereby [fol. 331] furnishing as accurate an analysis of the general retail situation as I know how to make.

In the lists following I have in general omitted other department stores unless for particular illustration where I have noted their situation:

A. Books and Stationery

The following stores are all of the specialized book and stationery stores in the City of Louisville that I know of:

Baptist Book Store	323 Guthrie Street
Ida M. Lang	912 E. Market Street
John P. Morton & Co.	420 W. Main Street
Southern Book Company	718 E. Market Street
W. K. Stewart Company	550 So. Fourth Street
Wilderness Road Bookshop	665 So. Fourth Street
Ye Booke Stalle	552 So. Third Street
The Raven Shop	921 Baxter Avenue

Of the above stores that of W. K. Stewart Company has undoubtedly the largest volume of sales of books and stationery in the City. The annual gross sales of no one of said stores, including its sales of stationery, etc., are in excess of $300,000.00.

The tax based upon this estimated figure would be $150.00, less the amount of its corporation license tax and any other license taxes, such as playing cards, etc., which said companies may have to pay. As compared with this tax the share of the threatened tax which would have to be borne by the stationery and book departments of Stewarts would be $465.70 on sales made in those departments [fol. 332] approximately only one-fourth in amount of those of the largest store in this class.

The largest store, as well as most of the others named above, is located in the downtown shopping district in Louisville, and is in active, continuous competition with the book and stationery departments of Stewarts for the business of the public. Furthermore, the sale of books, particularly, is usually upon a fixed basis as to price, and it would be impossible for Stewarts to pass on to the consumer the amount of tax based on its sale of books, and successfully to continue to compete with specialized book stores.

B. Clothing Dealers—Men's and Boys'—Retail

Under this heading the Directory lists the following fifty-two specialized stores:

Louis Appel Co.	425 So. Fourth Street
Myer Berman & Sons	220 W. Market Street
Blach's Inc.	205 So. Fourth Street
Crutcher & Starks	656 So. Fourth Street
Cunning & Brotzge	301 W. Jefferson Street
Double Worth Clothes Shop	317 So. Fourth Street
Ellenstein Bros.	216 So. First Street
Family Credit Clothing Co.	212 West Market Street
Federal Clothing Stores	313 So. Fourth Street
Fischer Clothing Co.	1030 W. Market Street
Getzel and Sons	612 W. Market Street
M. Goldberg & Sons	204 So. Fourth Street
Max Goldsmith	354 E. Liberty Street
Goldstein Bros.	217 W. Market Street
Morris Goldstein	428 So. Preston Street
[fol. 333] Goldstein & Moseson	1100 W. Market Street
H. C. Graham	620 E. Market Street
B. W. Graves Co.	326 W. Market Street
Hauger Clothes, Inc	322 W. Market Street
Hauger's	126 W. Market Street
Hurwitz Co.	436 So. 9th Street
J. R. Hyman	132 E. Market Street
Interstate Stores Co.	602 W. Market Street
Klothes Shoppe	316 W. Market Street
L. & N. Clothing Co.	124 W. Market Street
Lehmann Bros.	977 So. Shelby Street
Levy Brothers	Market—Cor. Third Street
Liberty Clothing Co.	310 West Jefferson Street
Lovenhart & Co.	Cor. 3d and Market Street
The Men's Shop	136 W. Market Street
Menter Clothing Co.	333 W. Market Street
Hyman Meyers & Bros.	335 W. Market Street
Modern Clothing Co.	310 W. Market Street
Morris Clothing Co.	314 W. Market Street
Moseson and King	433 W. Walnut Street
New York Clo. Co.	543 W. Market Street
The Olshine Co.	231 So. Fourth Street

Rodes Rapier Co.	Fourth & Walnut Streets
Royal Clothes Shop	606 W. Market Street
Bawer Schuster	238 E. Market Street
Schuster Brothers	108 E. Market Street
Jacob Seligman	352 E. Market Street
S. L. Seligman	642 So. First Street
Shelbyville Overall Co.	117 W. Market Street
F. L. Simons	833 W. Market Street
Standard Outfitting Co.	404½ W. Jefferson Street
Chester Stern	1701 West Market Street
Stewart Clothing Shop	321 W. Market Street
J. B. Strauss & Co.	234 So. Fourth Street
Town Talk Clothes	206 West Market Street
Wearbest Cloth. Co.	302 West Market Street
Winner Clothiers	318 West Market Street
Roche & Roche	523 South Fourth Street
Wilson Bros.	629 South Fourth Street

[fol. 334] In my opinion the following are the only stores in the above list having annual sales in excess of $400,000.00:

Louis Appel Company	425 South Fourth Street
Levy Brothers	Market—Cor. Third Street
Lovenhart & Co.	Cor. Third and Market
Rodes Rapier Co.	Fourth and Walnut Streets

None of the others will pay a tax under the 1930 Sales Tax Law at a rate higher than 1/20th of 1%. An accurate comparison of the estimated sales and tax of these stores with the men's furnishings, men's hosiery and underwear, boy's clothing and boy's furnishings departments of Stewarts, is not possible because of the fact that Stewarts has no men's clothing department, and this item represents a large part of the sales of the stores listed. However, the tax per dollar of sales in Stewarts amounts to approximately .00743% after all deductions. While the tax upon the dollar of sales of each of the above fifty-two stores, with the exception of four of them, will be only .0005% without considering the deductions permitted by the law. In other words, there is a discrimination against Stewarts and in favor of the great majority of specialized stores of at least 14.86 times. In all essential respects these specialized stores use the same methods of operating as do the corresponding departments at Stewarts.

[fol. 335] C. Clothing Dealers—Women's and Misses—Retail

Under this heading the directory lists thirty-one stores to which I have added from other sources of information sixteen additional stores with the result that the following list is, in my opinion, complete:

Bon Ton Cloak and Suit Co. ..... 320 So. Fourth Street
Buell, Inc. ..... 441 So. Fourth Street
Butterfly Frocks ..... 317 W. Oak Street
Casse Frocks ..... 625 So. Fourth Street
Madeline Chez ..... 1468 St. James Ct.
Conrad Schultz ..... 607 So. Fourth Street
DuRand Perry Co. ..... 538 So. Fourth Street
Hyman Eichenholz ..... 716 W. Market Street
Elson's ..... 530 W. Market Street
Greenstein's ..... 216 W. Market Street
Hollywood Shops ..... 519 So. Fourth Street
The Howard Co. ..... 507 So. Third Street
Husch Brothers ..... 212 So. Fourth Street
J. A. Jaglowics ..... 309 Speed Building
Jerome's ..... 130 W. Market Street
Johnson's Fashioned Shop ..... 623 W. Walnut Street
LaMode Apparel Shop ..... 218 So. Fourth Street
Le-Chic Co. ..... 611 So. Fourth Street
The Lerner Shop ..... 517 So. Fourth Street
Lord's ..... 516 So. Fourth Street
Carrie Pembroke ..... 1122 W. Walnut Street
Redfern Garment Co. ..... 223 So. Fourth Street
Sag's Ready-to-Wear Shop ..... 104 W. Market Street
Specialty Shop ..... 1004 W. Walnut Street
Standard Outfitting Co. ..... 404½ W. Jefferson Street
Star Garment Co. ..... 628 W. Market Street
Virginia Dare Dress Shops ..... 609½ So. Fourth Street
Ward-Stilson Co. ..... 310 I. S. Life Bldg.
S. A. Weinberg ..... 1625 W. Market Street
Weinberger's ..... 303 W. Broadway
[fol. 336] Worth ..... 222 So. Fourth Street
Jenny Lind ..... 640 So. Fourth Street
Besten-Langen Company ..... 518 So. Fourth Street
Byck Bros. & Co. ..... 532 So. Fourth Street
Diamond Bros. ..... 546 So. Fourth Street

Evelyn-Ann Shoppe	617 So. 4th Street
Fallahay, Inc.	Martin-Brown Building
Fleischaker's, Inc.	1519 W. Market Street
Graves-Sanders	222 So. Fourth Street
P. E. Henchey	607 W. Main Street
Jay Lane, Inc.	448 So. Fourth Street
Joseph Jacob	Commercial Building
Mangels, Inc.	528 So. Fourth Street
Pandora Dress Shop	458 So. Fourth Street
Patti	Starks Building
Sally Frocks	522 So. Fourth Street
Yarbra Gast Co.	208 W. Market Street
H. P. Selman Co.	4th Street at Walnut

Of these stores more than one-half of them are located in the downtown shopping district where the competition for trade is strenuous, and these stores are competing actively with Stewarts, and others similarly situated, for this character of business.

The following stores, only, in the above list have sales in excess of $400,000.00.

DuRand Perry Co.	538 So. Fourth Street
Besten-Langen Company	518 South Fourth Street
Byck Bros. Co.	532 So. Fourth Street
Mangels, Inc.	528 So. Fourth Street
H. P. Selman Co.	4th St., at Walnut

There is no essential difference between the methods of doing business of the above stores located in the downtown shopping district and Stewarts, but the discrimination against Stewarts and in favor of the large majority of the [fol. 337] specialized stores selling the same character of goods in the same way is approximately fifteen times per dollar of sales in the amount of tax threatened.

D. Draperies

The Directory lists four drapery stores to which I have added eight others, making the following complete list:

G. Bittner's Sons	427 So. First Street
Hubbuch Bros. & Wellendorff	619 So. Fourth Street
Hubbuch Jos. Sr. and Sons	890 West Market Street
George G. Fetter Company	410 W. Main Street

Burdorf Company.....427 So. Third Street
John W. Clare.....309 Guthrie Street
Dant Bros. .....1317 Bardstown Road
A. T. Duvall & Co. .....1315½ Bardstown Road
Elsie Kraziese Company.....624 Baxter Avenue
J. L. Strassel.....445 So. Third Street
Charlotte Whitehead.....305 W. Ormsby Avenue
Zach C. Offutt & Helm.....1244 So. Third Street

The sales of the largest store of this kind in the City are approximately $400,000.00, including their sales of rugs and furniture.

Based on this estimate their tax would be $200.00 less such deductions as they may be entitled to, while the tax for the drapery department in Stewarts would amount to $589.27 after all deductions on approximately one-fifth of the amount of business of the largest store in this line, conducted in all essential respects in the same way.

[fol. 338] E. Dry Goods—Retail

The Directory lists 152 stores other than department stores which handle dry goods.

The following department stores have, in my opinion (in all departments, including dry goods) sales in excess of $400,000.00.

J. Bacon & Sons.....334 West Market Street
Jefferson Dry Goods Company .....Fourth & Jefferson Streets
Kaufman-Straus Company...427 South Fourth Street
John C. Lewis Company.....450 South Fourth Street
Sears-Roebuck Company.....820 West Broadway
W. T. Grant & Company.....424 South Fourth Street
Ben Snyder Department Store .....522 West Market Street
Herman Straus & Sons.....Fourth & Market Streets

With the exception of the above, none of which are specialized stores, there is no store in Louisville, in my opinion, doing a retail dry goods business of $400,000.00, or more.

The following is a complete list of specialized dry goods stores as shown by the directory:

Max Abroms.....1008 W. Walnut Street
Lucille Akers.....1819 Portland Avenue
Phillip Albert.....3536 Greenwood Avenue
W. H. Allen.....2023 St. Louis Avenue
Ethel Appel.....426 So. Preston Street
Ralls Arnold.....4620 Park Blvd.
Sarah Arnold.....1008 East Oak Street
C. M. Baer.....847 E. Walnut Street
Barbee Way Dry Goods Co...2048 So. Preston Street
Abraham Bass.....1005 W. Walnut Street
[fol. 339] Myer Bass .....418 So. Preston
Beechmont Dry Goods Co....324 W. Woodlawn
Emma B. Benson.....1912 Bardstown Road
Besendorf C. P.....1459 So. Shelby
Jos. Bischof.....2062 So. Shelby
Samuel Bolstein.....1138 So. 7th Street
Boulevard Dry Goods Co....3501 Taylor Blvd.
W. F. Braun.....340 E. Ormsby
Lillian M. Breckel.....1922 So. Preston
Chas. Briskman.....210 E. Market Street
Maude Bryant.....329 North 25th Street
Mary E. Burkarth.....1228 So. Shelby Street
Margaret Butler.....4003 Shelby Rd.
Claude Campbell.....1402 Hemlock
T. O. Cecil.....301 North 34th Street
Dan Cohen.....748 E. Market Street
Jennie Cohen.....1450 So. 7th Street
Community Shoppe.....1503 Dixie Highway
Myrtle Conder.....2933 W. Walnut Street
E. & L. Conroy.....4001 Vermont Avenue
Conroy Shoppe.....1405 So. 2d Street
L. H. Crosby.....1602 Bardstown Road
F. J. Dalton.....844 E. Walnut Street
Max Dashoff.....336 E. Oak Street
Stella Daugherty.....616 Winkler Avenue
Elizabeth Dauth.....3507 W. Market Street
A. B. Davidson.....2932 So. Fourth Street
Jos. Davidson.....910 W. Market Street
Carrie Deeb.....2608 Portland
Ida M. Depeudry.....607 So. 28th Street
Barbara Dolfinger.....961 Charles

Anna Ernst.....1420 St. Anthony Place
Minnie Everett.....1735 W. Market Street
Ida Fierst.....1248 So. Shelby Street
Julia A. Fink.....1051 Bardstown Road
Abraham Fish.....122 E. Market Street
Henry Fleischaker.....632 E. Market Street
Moses Fleischer.....344 E. Market Street
Vincent Fleitz.....1832 Frankfort Avenue
[fol. 340] P. W. Frehling.....1149 So. 7th Street
J. H. French.....2326 Portland Avenue
B. Friedman & Son.....409 So. 7th Street
Morris Friedman.....906 W. Market Street
Phillip Friedman.....1002 W. Market Street
M. J. Gathof.....1718 Bardstown Road
Thersa Georgel (Mrs.).....1515 Story Avenue
Jessie A. Gray.....2340 W. Hill Street
Phillip Greenwald.....1105 W. Walnut Street
W. C. Guthrie.....1429 Washington
Nellie Hall.....962 So. 12th Street
Anna Harman.....1138 Goss Avenue
W. F. Hauck.....1000 Goss Avenue
Anna Heinzman.....785 So. Shelby Street
C. M. Herrman.....1241 Dixie Highway
W. S. Hert.....1039 So. 32d Street
Louis Herzberg.....1903 W. Broadway
Nora Heuger.....723 Vine Street
H. M. Hoffman.....3938 So. 2d Street
Alice Hofstatter.....3322 Rudd Avenue
Mary A. Holland.....2001 W. Walnut Street
Helen Howard.....118 E. Barbee Street
Edw. Howell.....2632 So. 6th Street
M. Hulsmeier.....948 Dixie Highway
S. L. Hymson.....457 So. 7th Street
Matilda Ising.....2207 So. Preston
Ida M. Jenkins.....657 So. 26th Street
Martha Kelcher.....2335 W. Market Street
Peter Karem.....131 E. Jefferson
J. P. Koch.....3312 W. Broadway
P. L. Kozlove.....328 E. Market Street
Krapp Dry Goods Co.....1506 Hickory
Lillian Krauss.....2232 Frankfort Avenue
Benj. Levine.....234 E. Market Street
Margaret M. Lowe.....2221 Wilson Avenue

Robt. Lucas	1810 Frankfort Avenue
Samuel Lurie	210 So. Floyd Street
Sadie Lynn	2210 Dundee Road
Isaac Lynn	532 So. Preston
[fol. 341] Norma Nagel	3319 W. Market Street
Thomas Maguire	1900 So. 4th Street
Anna M. Malin	2601 W. Kentucky Street
Elmore Marks	1231 W. Walnut Street
Marmor and Keniff	640 Lampton
Florence Mattingly	627 Baxter Avenue
Elizabeth A. Matz	1107 E. St. Catherine
Mary B. McCormack	1160 So. 15th Street
Miles Silk Shop	632 So. 4th Street
Meller Rose	1461 Dixie Highway
Lily K. Misback	645 E. Madison Street
Jessie Monroe	2932 Portland
Rady M. Morris	3934 So. Brook
Bessie Moss	506 So. Preston
P. B. Muier	1025 So. 28th Street
T. J. Naughton	918 So. Preston Street
Henry Niemeier Jr.	1136 So. 32d Street
C. C. Nolting	200 North 26th Street
Norman's Dry Goods Co.	535 W. Oak Street
G. L. Peal	1008 W. Market Street
E. W. Perry	4109 Reservoir Avenue
Kate Pfaffinger	1308 Story Avenue
J. F. and M. Pfeffer	1508 So. Shelby Street
Clara Pitt	1598 Fulton Street
Mrs. Prosper Plouvier	1426 W. Kentucky Street
Gus Potosky	315 So. 7th Street
Mrs. C. E. Ray	1702 Frankfort Avenue
John Renck	1511 So. 7th Street
Minnie B. Rice	4340 Taylor Blvd.
E. B. Rodman	312 Hiawatha
A. J. Roth	411 So. Preston Street
Alvina Ruschival	2332 W. Broadway
Josephine Sauer	3280 Taylor Blvd.
C. F. Schenck	1907 W. Market Street
Anna G. Schmitt	2014 W. Walnut Street
A. J. Schmitt & Sons	2704 So. 4th Street
J. Scholtes & Son	1704 W. Market Street

Belle Schulman	2501 Griffith Avenue
E. Schulman & Son	524 E. Market Street
[fol. 342] Alex Seligman	622 E. Market Street
Samuel Shaheen	2604 Portland Avenue
Morris Shersky	1430 W. Walnut Street
W. A. Shields	2734 Frankfort Avenue
B. H. Silverman	4444 Park Blvd.
Mrs. Lillian Stoker	1100 Logan Street
Gustave Stosberg	650 So. Shelby Street
Gertrude Stuckenberg	Poplar Level Road
Isaac Tennebaum	926 Baxter Avenue
Marie E. Tierney	2829 W. Market Street
R. E. Vaughn	301 North 19th Street
Mrs. Mary E. Vinson	4478 Park Blvd.
H. A. Vittitoe	902 So. 15th Street
Wackenthaler Jos.	1237 Logan Street
J. J. Walsh	1601 W. Ormsby
H. W. Waterman Co.	2453 Bardstown Road
Waterman and Taustine	636 W. Market Street
Anna E. Weber	992 Barret Avenue
Frederica Weber	992 Barret Avenue
Williams & Belinsky	410 So. Preston Street
Rosa Wilson	817 So. Preston
Samuel Winer	1732 W. Walnut Street
Katie Wiser	4400 Stolz
Philip Wolfson	1023 Dixie Highway
C. J. Wright	4456 Park Blvd.

Accurate comparison between Stewarts and the above stores having sales of less than $400,000.00 is not possible because of variations in the class and kinds of goods handled, and the materials furnishing the basis of competition.

However, the discrimination against Stewarts, and others similarly situated, and in favor of the 152 small independent stores, above mentioned, is approximately fifteen to one, per dollar of sales, although the dry goods business is conducted by both groups in the same way in all essential respects.

[fol. 343] F. Fur Dealers and Furriers

The following list includes to the best of my knowledge all of the stores in the City of Louisville, other than

Stewarts, handling furs. Due to the small number involved I have included department stores in this list with the specialized stores:

Lucille Cahill	664 So. 43d Street
Fifth Avenue Furriers	520 So. 5th Street
The Fur Shop	954 So. 3d Street
Green & Green Furriers	1138 So. 3d Street
Lee Furriers	201 W. Breckinridge Street
Louisville Furriers	208 Martin Brown Bldg.
New York Furriers	618 So. Fourth Street
Minnie B. Read	1108 So. First Street
Frank Schulman	1551 So. Bardstown Road
Gordon's Fur Shop	428 W. Chestnut Street
Younger the Furrier	637 So. Fourth Street
Besten & Langen	518 So. Fourth Street
H. P. Selman & Co.	Fourth & Walnut Streets
Durand-Perry Company	540 So. Fourth Street
Byck Bros. & Co.	532 So. Fourth Street
Kaufman-Straus & Company	427 So. Fourth Street
Herman Straus & Company	Fourth & Market Streets
J. Bacon & Sons	Fourth & Market Streets
John C. Lewis & Company	450 So. 4th Street
Bon Ton Cloak & Suit Co.	322 So. 4th Street

None of the above specialized stores nor fur departments of department stores have as much as $400,000.00 annual sales. In fact, none of them, in my opinion, have sales aggregating as much as $150,000.00 in furs.

The discrimination against Stewarts, and others similarly situated, and in favor of the specialized shops listed [fol. 344] above, is here, again, approximately fifteen to one.

It is further to be noted that, due to the unreasonable graduated feature of the 1930 Sales Tax Law, the fur department of each of the various department stores will pay at a different rate per dollar of sales on this class of goods (and the same is, of course, true of other departments) when the sales of furs of one department store may be greatly above or greatly below those of the others. In other words, the rate per dollar of sales has no connection whatever with the volume of sales of a particular department.

G. Furniture Dealers—Retail

The city directory and the classified section of the telephone book list sixty-nine retail furniture dealers. This list has been carefully checked and those stores whose business is entirely or mostly in second-hand furniture have been eliminated. The following list of fifty-six stores includes all of the specialized retail furniture dealers competing with Stewarts and others similarly situated.

Allen and K. Furniture Store	430 E. Market
J. Bacon and Sons	334 W. Market
Bell and Moss	1400 W. Market
Bensinger Outfitting Co.	315 W. Market
G. Bittner's Sons	426 So. First
Block and Goldberg	619 W. Market
Brooklyn Furniture Co.	448 E. Market
Brown and Melville	1201 W. Walnut
Central Furniture Co.	226 W. Market
[fol. 345] Hyman Cohen	113 E. Market
Dant Brothers	1319 Bardstown Road
Denhard Co.	219 W. Market
A. K. Easley	746 E. Jefferson
H. C. Evans	312 E. Market
Gem Furniture Co.	826 W. Market
H. M. Gerber Co.	810 E. Broadway
Great Western Furniture Co.	720 E. Market
James Greene	419 E. Market
Albert Hess Furniture Co.	550 E. Market
Household Outfitting Co.	525 E. Market
Kaufman-Straus Co.	437 So. Fourth
Fred W. Keisker and Son	315 W. Walnut
Kelly's Furniture Co.	631 W. Market
Louis Kort and Sons	323 W. Market
Joseph Lang	525 E. Market
Leader Furniture Co.	319 W. Market
Liberty Outfitting Co.	334 E. Market
W. F. Mayer	413 W. Market
Morris Monsky	701 W. Market
Raffo's	426 W. Market
Reliable Furniture Co.	520 E. Market
Rhodes Burford Co.	626 E. Market
Rinne Furniture Co.	513 W. Market

Sage Furniture Co.	316 E. Market
Sales Furniture Co.	307 W. Market
Spurrier Furniture Co.	920 W. Market
Spurrier and Wortham	830 W. Market
Herman Straus and Sons	318 W. Market
W. B. Trumbo Co.	900 W. Market
United Furniture Co.	447 E. Market
Weiss Outfitting Co.	1604 W. Market
West End Furniture Ex.	1636 W. Market
Wilson Chase Co.	521 W. Main
P. Cohen and Son	221 E. Market
H. B. Fortwengler	633 So. 1st
E. Hyman	127 E. Market
Elsie Krazeise Co.	624 Baxter
O. K. Furniture Co.	804 W. Market
[fol. 346] Square Deal Furniture	423 E. Market
J. L. Strassel	445 So. 3d
A. Salas	345 E. Market
Bass Sales Co.	208 E. Market
I. Robinsons	814 W. Market
Jean Furniture Co.	802 W. Market
Jos. Hubbuch & Sons	800 W. Market
Sternau's	732 E. Market

Of the above, the sales of the following six stores exceed $400,000.00:

Bensinger Outfitting Co.	315 W. Market Street
Central Furniture Co.	226 W. Market Street
Denhard Co.	219 W. Market Street
Great West Furn. Co.	720 E. Market Street
Fred W. Keisker & Son	315 W. Walnut Street
United Furniture Co.	900 W. Market Street

Only eleven of the above fifty-six stores, and only one of the larger stores, are located off of Market Street. It is apparent, therefore, that the center of activity in retail furniture is on said street, which is three blocks north of the location of Stewarts and rents and taxes on said street are considerably lower. Against this factor of cheaper location, the furniture department of Stewarts, and others similarly situated, must likewise carry the burden of this threatened tax which is approximately fifteen times the amount, per dollar of sales, that will be paid by fifty of the

above fifty-six merchants and larger per dollar of sales than any of the remaining six although these six merchants each do a much larger volume of business than the furniture department of Stewarts.

[fol. 347] The sales of the store having the largest volume of sales in said list do not exceed $700,000.00. Based on this estimate their tax under the 1930 Sales Tax Law, would be $950.00 less deductions. Compared with this the tax on the furniture department at Stewarts would be $1,097.96 after deductions on approximately 1-5th the volume of business. In other words, the tax per dollar of sales in the furniture department of Stewarts is at least five times greater than the tax per dollar of sales of the largest store in this line.

H. Music Dealers

For purposes of comparison here I have lumped together the stores listed under the following headings in the directory: Piano Dealers, Phonographs and Records, Radio Sets and Supplies and Radio Equipment and Supplies. In my opinion the following list includes all of the recognized music stores in the city:

Baldwin Piano Co.	Broadway Corner Third
Johnson Piano Co.	213 W. Walnut Street
Shackelton Piano Co.	324 W. Chestnut Street
F. M. Tiller	515 South Third Street
The Rudolph Wurlitzer Co.	628 So. Fourth Street
C. J. Baron	510 E. Market Street
Bruner Greenup Music Shops	307 So. Fourth Street
Lucinda E. Smith	1205 W. Walnut Street
Stump's Music Shop	427 E. Jefferson Street
A. J. Waldman	500 So. Preston Street
Gus Boldt Radio Co.	427 W. Chestnut Street
Broadway Radio Shoppe	713 E. Broadway
[fol. 348] P. I. Burks and Co.	911 W. Broadway
Cherokee Radio Shop	1315 Bardstown Road
Chiquelin Radio Co.	1587 Bardstown Road
Crescent Hill Radio Shop	2728 Frankfort Avenue
Thos. Crutcher, Jr.	1933 So. Fourth Street
Arthur Demling	2205 Frankfort Avenue
Ditto Radio Sales	3801 W. Broadway

Doup's Point Radio Shop	2435 Bardstown Road
S. C. Glass	2459 Bardstown Road
Grays Radio and Tire Service	104 Breckinridge Lane
Henderson Radio Corporation	501 W. Chestnut Street
Highland Radio Service	1021 Bardstown Road
Hills St. Radio Shop	1799 W. Hill Street
W. H. Hobbs	2129 Eastview Avenue
Jarrett Radio Co.	1521 Bardstown Road
Henry Kiefer	133 Amherst Avenue
J. C. Kirchdorfer	922 Baxter Avenue
W. F. Long	1837 Deerwood Avenue
Louisville B. T. Radio Co.	1763 Bardstown Road
Monarch Sales Co.	729 So. 8th Street
Parkland Electric Co.	1103 So. 26th Street
Portland Radio Co.	2614 Portland
Radio Corporation of Ky.	618 So. 2d
Radio Doctors	204 W. Market
Radio Service Shops	1022 Bardstown Road
F. G. Schack	619 So. 42d
Scientific Radio Corp	637 So. 18th Street
Southern Radio Co.	1801½ W. Market Street
Speedometer and Radio Shoppe	1007 E. Broadway
Stilz-Ave. Radio Shoppe	100 Stilz Ave.
Super Radio Co.	1134 So. 25th
Tiller-Langley Radio Shop	First Floor Breslin Bldg.
C. E. Watkins	1107½ Bardstown Road
O. W. Wittig	2537 Garland Ave.
Acme Electric Company	1162 So. 4th Street
Fourth Avenue Sales Co.	628 So. 4th Street
[fol. 349] Gas & Electric Shop	309 W. Chestnut Street
Bomar-Summers Hardware Co.	315 West Jefferson
Kelsall Music Company	909 West Broadway
Milliken Tire & Battery Co.	955 So. Third Stre-t
Alex J. Schultz	226 W. Broadway
The Sutcliffe Co.	225 So. Fourth Street
Greenfields Majestic Shoppe	2250 South Shelby Street
Wm. F. Schaetzly	1930 So. 3d Street
Charles Stauble	1806 Frankfort Avenue
Tonini's Radio Store	Shelby & Gray Streets
Albin H. Wunderlich	652 Baxter Avenue

None of the above stores have sales in excess of $400,000.00. The largest has annual sales which do not exceed

$150,000.00, upon which the tax would be $75.00 less deductions. Compared with this the tax on the music departments at Stewarts is $549.23 after all deductions and on a volume of sales approximately one-half of those of the largest specialized store in this line. In other words, on half the volume of sales the tax against Stewarts is more than seven times greater.

I. Milliners

The following list of thirty-eight specialized millinery shops is in my opinion complete:

Mabel H. Bateman	410 Camp
Bilharz Millinery Co.	230 So. Fourth
Rose E. Burgy	1159 Dixie Highway
Pauline Clausen	130 E. Market Street
Sophia Dreyfus	706 W. Market Street
Gordon's Millinery	529 So. Fourth Street
Ella M. Grabler	115 So. 26th Street
[fol. 350] Grace & Merit	562 So. Fourth Street
Gross Millinery Co.	226 So. Fourth Street
A. C. Hand	713 So. Fourth Street
Sadie Hilbert	627 So. Shelby
Minnie Holstner	1713 West Market Street
Mae King Shoppe	316 W. Chestnut Street
Lizzie Kummritz	726 W. Market Street
Maude Long	713 West Jefferson Street
Marie Luxemburg	1932 W. Market Street
Marjden Hat Shop	524 So. 4th Street
The Mary Louise	127 W. Oak Street
Anna McGill and Co.	627 So. Fourth Street
Esther Mondry	645 So. Fourth Street
Margaret L. O'Neil	520 W. Breckinridge
Amy Badecker	664 So. 4th Street
Riehlmann's Millinery	1580 Bardstown Road
M. G. Ruwe	310 West Market Street
Eulalia W. Sauermann	2918 Frankfort Avenue
Elizabeth M. Schmidt	1246 So. Shelby Street
Irene Seidell	1609 West Market Street
Pansy L. Seyfert	336 W. Broadway
Shenley's	514 So. 4th Street
Sivori's	138 E. Market Street
E. Strange Co.	247 Starks Bldg.

Chapeau Suzanne	206 Martin Brown Bldg.
Alpha Thixton	400 E. Oak Street
Lois C. Thomas	1045 Bardstown Road
Emma J. Warren	407 W. Broadway
Maggie U. Wobben	1733 W. Market Street
Miss A. Wentzel	1208 So. 3d Street
Wm. Wolf	306 W. Broadway

Two stores located on Fourth Street which, I am advised, are owned by the same merchant have together probably the largest volume of sales of any of the stores listed. Their joint sales are not in excess of $150,000.00.

[fol. 351] Based upon this estimate their tax, under the 1930 Sales Tax Law, would be $75.00, with deductions. Compared with this the tax chargeable to the millinery department of Stewarts would be $549.95, after all deductions, on approximately half the volume of business above set out.

Approximately half of the stores which I have listed are in the downtown shopping district where they are in continuous active competition with the millinery department of Stewarts, and others similarly situated. In this class of goods the discrimination against Stewarts and in favor of the specialized stores is, again, 15 times, per dollar of sales.

J. Shoes

The following sixty-six stores specialize in the handling of women's and children's shoes as are handled by the shoe department of Stewarts:

D. A. Anderson	788 So. Shelby Street
Arch Preserver Shoe Shop	609 So. 4th Street
Baker's Shoe Store	220 So. Fourth Street
Morris Bash	206 So. Preston
A. H. Bass	1705 W. Market Street
A. J. Besendorf	1561 Bardstown Road
V. J. Besendorf	2235 W. Market Street
Boston Shoe Co.	417 So. 4th Street
F. C. Bruch	1257 So. Preston
Cantilever Boot Shop	327 W. Walnut Street
Chandler Boot Shop	460 So. 4th Street
Churney's Shoe Store	1618 Bardstown Road
Dan Cohen	740 E. Market Street
Dan Cohen Co.	229 So. 4th Street

[fol. 352] Nathan Cohen	417 So. 7th Street
Dixie Shoe Store	210 W. Market Street
Donald's	421 W. Walnut Street
Dorothy May Shoe Shop	421 So. 4th Street
Michael Dougherty	622 W. Market Street
Katherine Drescher	919 So. Shelby Street
Adam Eigelbach	1221 So. Shelby
Emerson Shoe Co.	405 So. 4th
Feige's Shoe Store	431 E. Market St.
Feltman & Curme Shoe Stores Co.	321 So. 4th
Forsythe Shoe Corp.	548 So. 4th Street
Jacob Friedman	1460 Dixie Highway
Gekco Co. of Louisville	521 So. 4th Street
Wolf Glazer	1633 W. Market Street
Morris Cross	342 E. Market
Ground Gripper Shoe Store	423 W. Walnut St.
H. & E. Shoe Company	412 So. 4th Street
H. W. Hauenstein	1365 So. 7th Street
John Hauerstein	1478 So. 7th Street
J. B. Hinkebein	802 E. Broadway
Jacob's Shoe Store	207 So. 4th Street
Juvenile Arch Preserver Shoe Shop	1506 Bardstown Road
Kay's	432 W. Market Street
Emma Kircher	1410 Story Avenue
Jos. Markuson	447 So. 7th Street
Michael Shoe Co.	336 W. Market Street
Model Shoe Store	1033 Dixie Highway
J. C. Moffet	915 Baxter Avenue
Robt. Mairin	106 E. Market Street
Nisley Shoe Co.	308 So. 4th Street
Novelty Shoe Store	207 So. 4th Street
Passamaneck's Shoe Store	320 E. Market Street
Novelty Shoe Store	309 So. 4th Street
Potter's Shoe Store	464 So. 5th Street
Samuel Pozitzer	220 So. Preston
Queen Quality Boot Shop	536 So. 4th Street
Harry Rosenberg	1466 Dixie Highway
[fol. 353] The Sample Shoe Store.	621 W. Walnut Street
Isadore Schlossberg	210 So. Preston
Edw. Shaikun	708 W. Market
Shoe Market	424 W. Market
Spalding Shoe Co.	769 Dixie Highway

Sutt & Son	216 E. Market Street
Three Dollar Shoe Shop	336 W. Jefferson Street
Travers Shoe Store	459 So. 7th Street
J. H. Walser & Sons	1276 So. Shelby
Simon Wells	314 E. Market
J. C. Warner	2604 W. Market
White Shoe Store	134 W. Market
C. W. Whitman	3473 Taylor Blvd.
J. Zoll & Son	1136 W. Market Street

The sales of the largest of these stores does not exceed $500,000.00, upon which the tax would be $300.00, or .0006% per dollar of sales, without taking deductions into account. Compared with this the tax after deductions of .00743% per dollar of sales by Stewarts is more than twelve times greater. Approximately a third of these sixty-six stores are in the downtown shopping district where they are in continuous active competition with Stewarts for the trade of the public. As to the great majority of all of said stores the discrimination is again fifteen times on the dollar of sales.

4. The above lists do not, by any means, cover all of the stores in the city with which Stewarts is in active competition in its various departments. It is, however, the most complete list as to classes of merchants that I know how to make from the sources of information available to me.
[fol. 354] Various specific instances as to other departments occur to me, demonstrating the discrimination against Stewart's, and others similarly situated, and in favor of the more or less specialized stores and smaller stores. For example, the Sutcliffe Company, which specializes in sporting goods and toys competes actively with the toy department at Stewarts. No tax is paid by Sutcliffe Company. Based upon my estimate of their sales their tax would be $300.00 which is completely offset by its corporation license taxes and license taxes paid for handling pistols, playing cards, and so forth, aggregating $318.50. Compared with this, Stewarts, on toys alone is chargeable with a tax of $313.10 after all deductions on sales approximately 1-5th in amount of those made by said company.

Again, our china and glassware department competes with Edward Dolfinger, Inc. Dolfinger's, for many years,

conducted a large business in china and glassware. Some years ago they discontinued business but reopened again two years ago and now are doing an annual business not exceeding $100,000.00. Here, as in the case of all smaller stores, Stewarts is required to pay fifteen times the amount per dollar of sales in taxes under the threatened levy of the 1930 Sales Tax Law.

The directory lists 487 restaurants in the City of Louisville. Stewarts serves only luncheon in its restaurant while the majority of those listed serve three meals. Here again the discrimination is fifteen times on the dollar of sales [fol. 355] in every instance that I know of.

There is no essential difference between the methods of conducting the business of Stewarts, and others similarly situated, and the other stores mentioned in this affidavit. Many of these stores carry more than one type of goods and divide their business into two or more departments, some of which compete with one or more departments of Stewarts and others, perhaps do not.

In every essential respect these smaller stores are doing a similar business to that that is being conducted by Stewarts, appealing to much the same public, buying, in many cases, in equal or larger quantities, sometimes from the same wholesalers, and selling in the same way to the same people on credit and for cash.

Stewarts now pays more in taxes than any other retail merchant in Louisville—approximately $80,000.00 in direct taxes during 1930—not considering this threatened tax. It is called upon for contributions to numerous civic and charitable enterprises, and takes a leading part in many such activities either as a store or through its officers and employees.

Stewarts' trade is not confined to the city of Louisville, but it attracts customers from all nearby cities in this and other states. Many of the smaller stores profit directly from the shoppers who are attracted to Stewarts from out- [fol. 356] side the city and it, therefore, enhances real estate values in its neighborhood.

A substantial volume of Stewart's sales are made in interstate commerce to customers residing in other States and buying merchandise by telephone, mail or personally from Stewarts, to be delivered to the buyers at their residences in such other States.

Stewarts has over 2,000 regular charge accounts with persons residing in the State of Indiana alone, and numerous charge accounts with persons residing in States other than Kentucky and Indiana.

Merchandise sold on all such accounts is regularly delivered by Stewarts to the buyers at their residences, in the regular course of interstate commerce. In fact, Stewarts makes daily deliveries to its customers residing in Jeffersonville and New Albany, Indiana.

In nearly all of the cases which I have mentioned the specialized stores competing with one or more of our departments have the great advantages of ground floor location and window space for permanent displays. Stewarts, of course, cannot make permanent window displays of the goods of all its departments but must allot such space at intervals throughout the year. Also, the departments located in the basement or on the six floors above the ground floor obviously do not have the same advantages that come from ground floor location.

Stewarts and other retail merchants in Kentucky are also brought into direct competition with mail order [fol. 357] houses located in other States who secure by mail and catalogue, orders for goods to be shipped into Kentucky to buyers resident in Kentucky.

Another type of competition which is felt by Stewarts is with the sales of prominent New York and Chicago shops who send representatives to Louisville and make sales from sample. These exhibitors include such stores as Best & Company, Saks-Fifth Avenue, Brooks Brothers, Delman, De Pinna, Crossways Shop, Frank Brothers, McCutcheon, Peck and Peck, and numerous others. While the sales made by these shops are free from taxation throughout Kentucky, it is apparent that their competition is felt only in cities large enough to attract their exhibitions. It is only in the larger cities that there are stores of sufficient size to pay any substantial tax under the 1930 Sales Tax Law. Consequently the large stores in Kentucky must meet this outside competition and also suffer the discriminations of this law upon every sale which they make.

The principles and results apparent from the comparisons which I have made are equally applicable for other years than 1930, and to other lines of trade than those

which I have expressly mentioned herein. There are no stores competing with Stewarts in the city of Louisville other than those listed herein that have sales in excess of $400,000.00. I know of no reasonable basis upon which the [fol. 358] classification made by the 1930 Sales Tax Law can be justified.

—— ——.

Subscribed and sworn to before me by Robert J. McKim this — day of February, 1931. My commission expires the — day of ——, 19—. —— ——, Notary Public, Jefferson County, Kentucky.

[fol. 359] AFFIDAVIT OF FRED LEVY

STATE OF KENTUCKY,
County of Jefferson, ss:

Affiant, Fred Levy, on oath states:

I am senior member of the partnership Levy Bros., plaintiffs in a suit for injunction against John B. Lewis, et al., brought in the United States District Court for the Western District of Kentucky, at Louisville, being No. 610 on the equity docket.

I am 53 years of age and all my life I have been in touch with the business of Levy Bros., founded by my father and his brothers about 70 years ago and from the beginning conducted in one store at the same location. Having been connected with this firm for over 36 years. After the death of my father and his brothers, I became the senior member of the firm, and in that capacity I have had for more than 20 years the most intimate knowledge of the business of the firm and the conditions affecting it, such as the problems of financing, development, competition, buying, selling, display of goods, advertising, and the many other questions of vital importance that determine the success or failure of a retail store and especially of a store like that of Levy Bros., handling lines of merchandise in which the taste of the buying public must be trained as well as indulged.

I know the recurring problems of ever-changing conditions and keen competition constantly facing retail mer- [fol. 360] chants in such a business as that of Levy Bros.

I know the value of a good name and a good business reputation in developing and preserving the good-will of a business. My firm has devoted 70 years of its business life to building up a reputation for integrity and fair dealing with the buying public and for selling goods of high quality at the lowest prices consistent with successful operation of its business.

At the same time, I know that, year by year, we have met new problems in changing tastes, styles and modes of dress, and new as well as old competition. Sometimes this competition comes from old-established business houses doing business under fairly similar conditions. Sometimes it comes from the small merchant with a store and stock of such size that he can handle it at small expense by himself or members of his family with little outside expense.

Sometimes the competition comes from a large organization operating a branch store in Louisville under conditions that favor such competitor at the expense of this affiant's firm. This is particularly emphasized under the so-called "Gross Sales Tax Law" enacted at the 1930 session of the Kentucky Legislature.

Under equal conditions Levy Bros. welcome any fair competition, but they cannot afford to concede any tax advantages.

For example: Levy Bros. are the largest retail dealers in ready-made clothing in the State of Kentucky. In that [fol. 361] branch of their business, for the calendar year of 1930, their gross annual sales were over a million dollars. If the Kentucky "Gross Sales Tax Law" of 1930 be upheld as valid and enforced against Levy Bros., they will be put to a great disadvantage and subjected to a great handicap in the way of taxation discriminatory against them and in favor of 52 other retail stores in Louisville dealing specially in men's and boys' clothing, to say nothing of similar stores located elsewhere. Taxes properly chargeable against and allocated to the clothing department in the store of Levy Bros. will be greatly augmented under the 1930 Gross Sales Tax Law, and the discrimination resulting therefrom, in favor of their competitors and against Levy Bros., is fully, fairly and correctly stated in the bill of complaint filed by them in their suit against John B. Lewis, et al., above mentioned.

In addition to the competition above pointed out, a new business rival has entered the field of competition with Levy

Bros. Richman Bros. Co., a corporation, which is a very large chain store organization, has within the last few months established a store for the sale at retail of men's ready-to-wear clothing, suits, overcoats and similar articles of clothing, on Fourth Street between Liberty and Walnut streets, within the central retail business district of Louisville. The Richman Bros. Co. does not own or operate any other store in Kentucky. Its gross annual sales in the store [fol. 362] established by it in Louisville will not exceed $400,000, and hence it would be taxed under the 1930 law in the lowest bracket, whereas the men's clothing department of Levy Bros. would, as set forth in their bill of complaint, be taxed in much higher brackets.

Such discriminatory and unequal burden of taxation is imposed by the 1930 Act upon Levy Bros., and especially upon their men's clothing department, in the conduct of their business in competition with Richman Bros. Co., who will be actually taxed under said Act at less than one-twentieth of one per cent, when approximately thirty to forty times that rate of taxation will be imposed by the same Act upon Levy Bros.' clothing department.

There is no conceivable or justifiable reason for such discrimination. For example, Richman Bros. Co. is a chain organization conducting in other States a great many stores for the handling of a similar line of merchandise. Its aggregate volume of business in all of its stores is many times larger than the volume of Levy Bros.' business. It advertises and displays its merchandise for sale in the most effective and up-to-date methods. Its business is owned by non-residents of Kentucky, and the earnings derived from the conduct of its business are sent out of Kentucky to be spent or invested in other States.

Every conceivable argument, whether sound or fallacious, that could possibly be urged in favor of a heavy tax upon chain stores and for the relief of individual mer- [fol. 363] chants is flouted by a law which imposes upon Levy Bros. a rate of taxation approximately forty times that imposed upon Richman Bros. Co. as one of its competitors.

Likewise, the same situation exactly exists with respect to other chain stores, such as Wilson Bros., National Shirt Company, and others that deal in men's furnishings in competition with similar departments conducted by Levy Bros.

Many other instances could be cited in shoes and hats as well as the above clothing and furnishings, but these are typical examples of clear and hostile discriminations against Levy Bros. effected by the 1930 Gross Sales Tax Law.

Affiant has for many years been active in the business life of Louisville, and particularly has taken his part in studying and promoting the interests of retail merchants generally in Louisville and throughout the State and country. He has not only been President of the Louisville Retail Merchants' Association and of the old Louisville Commercial Club, now merged with the Louisville Board of Trade, but he has also been President of the Kentucky State Clothiers' Association and President of the National Association of Clothiers and Furnishers, composed of over 8,000 members. By virtue of his experience and training in his business and in the allied lines of his activities, affiant has now and for years past he has been quite familiar with the general retail situation in the city of Louis-
[fol. 364] ville, and particularly with the nature and extent of business done by stores conducting the same type of business as Levy Bros. He has had an opportunity to observe and he has observed the nature and extent of the business done by the competitors of his firm, and by reason of his study of conditions he is qualified to state approximately the amount of business done by them.

Affiant has read the affidavit of Robert J. McKim, filed in these suits to enjoin the enforcement of the 1930 Kentucky Gross Sales Tax Law. Based upon his own survey and careful and long-continued study of local retail conditions in Louisville affecting retail stores generally, as well as retail stores conducting a business similar to that of Levy Bros., affiant is enabled to state and he does state from his own study and observation and his own knowledge gained thereby:

(1) That the statements set forth in said McKim's affidavit are all true with respect to the gross annual sales of retail merchants in Louisville dealing in articles similar to those handled and sold by Levy Bros. in their various departments as set forth in their bill of complaint in this litigation.

(2) That the statements set forth in said McKim's affidavit are all true with respect to the operations and gross annual sales of other retail merchants in Louisville dealing in merchandise of various kinds other than the kinds of merchandise handled and sold by Levy Bros.

[fol. 365] (3) That the statements set forth in said McKim's affidavit are true with respect to the number of retail merchants of all classes and kinds in Louisville who have gross annual sales exceeding in volume the sum of $400,000.

The business of selling motor vehicles of various kinds in the city of Louisville is so essentially different from other forms of merchandising (if automobiles should be properly classed as merchandise or dealers therein should be properly classed as retail merchants operating retail stores in Louisville) that affiant has no personal knowledge as to the gross annual sales of vendors of motor vehicles in Louisville, and therefore he does not undertake in this affidavit to make any statement with respect to their gross annual sales, and no statement on that subject is made in the affidavit of said McKim.

The same is true of dealers in various kinds of commodities and manufactured articles not usually handled by retail merchants of the class specified in said McKim's affidavit, and the same is true with respect to retail grocers and other merchants in Louisville handling lines of goods that do not come in competition with Levy Bros. as retail merchants.

Fred Levy.

[fol. 366] Subscribed and sworn to before me by Fred Levy this 7th day of February, 1931. My commission expires February 28, 1934. Lillian Nunemacher, Notary Public, Jefferson County, Kentucky. (Seal.)

[fol. 367] AFFIDAVIT OF DANN BYCK

STATE OF KENTUCKY,
County of Jefferson, ss:

Dann Byck, being first duly sworn, makes the following statement under oath:

My name is Dann Byck and I reside in Louisville, Ky. I am President and General Manager of Byck Bros. & Co., a corporation organized under the laws of Kentucky, which operates a retail establishment in the heart of Louisville which specializes in women's clothes. This store is an independent store, that is the owners do not own or control any other store. The establishment is divided into 10 departments each of which handles a different type of article from that handled by any other department. Each department is a separate unit and is entirely distinct from any other department. Each department is charged with its floor space, its electric light, its payroll, etc., and in effect each department is a separate store under the same roof. The competition for each department is offered by outside stores selling similar articles and in many instances outside competitors who sell only a single type of goods have greater sales than the department in our store handling that article.

Byck Bros. & Company has annual sales of approximately $700,000 each year where the sales of all departments are added together but the sales of any single department does not exceed $300,000. These departments as stated before [fol. 367½] compete directly with stores which handle the same type of article and nothing else, and since their volume of sales is no larger than the sales of these competitors they should not be subjected to a higher rate of taxation. However the Kentucky Gross Sales Tax law fixes the rate of taxation by adding the sales of these departments, thereby subjecting each department to a tax which approaches 1%. Competitors on the other hand are only subjected to a nominal tax.

For example, we operate a millinery department which has annual sales of $15,000. This store meets the competition of The Gordon Shop, Marjdon and Shenley's. All three of these establishments are in the immediate vicinity and their sales tremendously exceed the sales of our millinery department. Their tax, however, would only be 1/20 of 1% since their sales do not exceed $400,000, whereas our millinery department doing the same kind of business as these competitors must bear a much heavier burden.

I have spent the last 10 years in the employ of Byck Bros. & Co. and I am familiar with the general rules governing the operation of stores carrying on this type of business. In our case we operate on the basis of a small margin of profit.

This is one of the outstanding features of efficient merchandising. Our records show that we make 1% profit for each dollar of sale. Investigations which have been made by the Harvard Bureau of Research show that this is about the average that can be expected from a store of our type. [fol. 368] It can be readily seen that the Kentucky Gross sales tax takes a large percentage of this profit.

This store was established 30 years ago by my father. At that time he had three employees. Today the establishment is doing about $700,000 worth of business annually and is giving employment to 100 people. Our growth is due to the adoption of efficient merchandizing methods and we would be discarding these methods if we attempted to secure a larger profit than we are making. We will have to content ourselves, therefore, with the 1% profit we are making. If we increase our sales the per cent of profit to sale will not increase but the tax would. For example, let us assume that through intense effort and application we are able in 1930 to increase our business an additional one hundred thousand dollars, on which we would earn, figuring on a 1% basis, a net profit of $1,000. Under the confiscatory terms of this tax, $700 of this $1,000 profit would be taken. If, in the course of another year, we gain another $100,000 volume and its accompanying $1,000 profit, $850 of this additional $1,000 profit will be taken as tax. And finally in the third year, if we are able to reach our goal of $1,000,000 by adding another $100,000 volume, the entire $1,000 profit derived from this increase will be taken as additional tax.

Departments selling a special article are so distinct from the remainder of the store that they are often leased out to persons who operate them much in the same way as they [fol. 369] would operate their own store. In addition to operating the store in Louisville, Byck Bros. & Co. lease a department in the store operated by the Wolf Wile Co. in Lexington, Ky. This department, of course, is in no way affected by the sale of goods in Louisville. It competes directly with stores in Lexington which sell the same type of goods. Its volume of sales is $47,000 a year and its competitors having an equal volume would only have to pay 1/20 of 1%. Under the gross sales tax law, this department would be taxed at a much higher rate. In order to determine the rate of taxation, the statute requires that sales of this department should be added either to the sales

of all other departments in the establishment operated by the Wolf Wile Co. or else to the sales of the store operated by us in Louisville. I am not certain whether the sales of this department will be added to Wolf Wile's sales or to the sales of our Louisville store but I am certain that the sales will not be taxed without reference to any other sales. No matter how the gross sales tax statute is construed in this regard this department is discriminated against. If its sales are added to Wolf Wile's it will fall in the higher brackets and we will have to pay approximately 1% on its sales merely because somebody else sells another type of goods under the same roof. If the sales of this department are added to our sales in Louisville then it increases our sales and places us in a bracket where our tax approaches 1% and as a result this department would be sub-
[fol. 370] jected to a higher tax merely because we operate a store selling a great many different items in a different city. Persons competing with this department in Lexington who sell nothing but ladies shoes and who have as great or a greater volume of sales pay a tax of 1/20 of 1% or a tax which is about 19/20 of 1% below the tax on the department operated by us.

This 1% tax which is imposed upon us and not upon competitors who sell the same goods but who confine themselves to the sale of only one type of goods enables those competitors to undersell us in their particular line and take away our business without subjecting themselves to the tax. It must be borne in mind that these persons have the same buying facilities that we have. About 95% of them belong to buying organizations and they purchase for their store as much or more than we buy for the department which competes with them. Our Inexpensive Dress department has sales of about $50,000 per year. The Hollywood Shop operating on the same block sells Inexpensive Dresses and is in direct competition with this department. This competitor sells nothing else and his sales are greater than the sales of our department. If we should increase the sales of this particular department or any department the increased sales would be subjected to a tax which would be subjected to a tax which would approximate 1%. On the other hand The Hollywood Shop could undersell us because of the fact that we have to pay a heavy tax not imposed on him. He
[fol. 371] could, therefore, take away all this business and

increase his sales to about $150,000 but he would not have to pay more than 1/20 of 1%.

The same sales would be taxed at 1% if we would make them and only 1/20 of 1% if our competitor would make them.

Louisville, Ky.,
January 15, 1931.

(Signed) Dann C. Byck.

Subscribed and sworn to before me by D. C. Byck this 15th day of January, 1931. Chas. Troxler, N. P., J. C., Ky. My commission expires Jan. 20, 1932. (Seal.)

[fol. 372] AFFIDAVIT OF C. B. TURLEY

STATE OF KENTUCKY,
County of Jefferson, ss:

C. B. Turley, being first duly sworn, makes the following statement under oath:

My name is C. B. Turley and I live in Louisville, Kentucky. I am President of the Kaufman-Straus Company, Incorporated, which operates a Department Store in the City of Louisville. We sell Shoes, Dressgoods, Stationery and Household Goods. The Kaufman-Straus Store is divided into twenty-five Departments, each of which handles a specialized article. Each Department is a separate unit and is entirely disconnected from every other Department in the Store. Each Department is charged with its floor space, its advertising, its Pay Roll, its lighting, etc. Most of the Departments have special Buyers, who attend to the matters of that Department and are not concerned with any other Department.

Each Department competes with stores selling similar articles. Many of these stores are operated by persons and corporations who do not operate any other stores and who do not handle in their one store anything but an article similar to the article handled by a particular Department in this store. The sales in any one Department of the Kaufman-Straus Store do not exceed Four Hundred Thousand Dollars ($400,000.00) and as a matter of fact, the max-

imum sales of any particular Department are $100,000.00. Many competitors who operate only a single store and who [fol. 373] sell at that store articles which are handled by particular Departments in this store and nothing else, have sales which are equal to or exceed the sales of the Department in this store with which it competes.

For example, Ladies' Shoes has sales of approximately $55,000.00 annually. It competes directly with Boston Shoe Store and Walk-Over Shoe Company, who sell nothing but Shoes. The sales of these competitors are equal to the sales in this Department, but they do not exceed $400,000.00, and as a result, these competitors would only have to pay at the rate of one-twentieth of one per cent under the Gross Sales Tax Law of Kentucky. On the other hand, our Ladies' Shoes would have to pay approximately one per cent on its sales, although they only amount to $55,000.00. This is due to the fact that the Gross Sales Tax Law of Kentucky compels us to add the sales of the Shoe Department to the sales of the other Departments in the Store, thus throwing us into the higher bracket. Another example is our Silk Department, which has sales of approximately $100,000.00 annually. It competes directly with the Miles Silk Shop, which sells nothing but silks, and the same tax bracket would apply as above.

Thirty-two Departments are leased out to different Corporations, which operate them in the same manner that they would operate their own stores. These Departments are no different than the other Departments which are operated by the Kaufman-Straus store, except that these are [fol. 374] owned by corporations which do not own or operate any other Department in this store. I am informed and believe that these leased Departments would only be subjected to a tax of one-twentieth of one per cent, whereas, other Departments would be subjected to a one per cent tax.

The provision of the Gross Sales Tax Law of Kentucky compels the aggregation of all the sales in all Departments operated by the Kaufman-Straus store. The total sales will exceed $400,000.00, thus placing us in a higher bracket.

If the Taxing Statute is construed in such manner that the sales of the Leased Departments would be added to our sales, our tax would be increased by the outside sales. Under either construction, the addition of sales in unre-

lated Departments and the imposition of a graduated tax on the total discriminates against Department Stores and is in favor of individual stores which handle only one line of goods. Departments in such a store as the Kaufman-Straus Company are operated on the basis of a small margin of profit, which does not exceed one per cent. The increase of Departments in a particular store would not add to the per cent of profit per dollar of sales in another Department. The per cent of profit, therefore, does not increase with the increased sales of the entire store. The per cent of profit for each dollar of sale is less than one per cent and the imposition of an additional one per cent tax would take all of this profit and would be prohibitive and confiscatory. [fol. 375] The proposed tax could not be shifted to the consumer. An increase in price would enable competing stores to undersell us and deprive us of business. However, these competitors would only subject themselves to a tax of one-twentieth of one per cent as a result of this increased business. For example, a Department Store operates ten Departments, each of which has sales of $200,000.00; the total sales in the store would be two million dollars ($2,000,000.00) and each Department would have to pay a one per cent tax. On the other hand, the ten competitors, each of which sells an article similar to that sold in one Department and each of which has sales of Two Hundred Thousand Dollars ($200,000.00) per year, would only have to pay a tax of one-twentieth of one per cent. Each competitor could take away the business from a Department store in the particular line in which he is engaged, and as a result each competitor would have sales of Four Hundred Thousand Dollars ($400,000.00) and still be subject to the lowest rate of taxation. In other words, although all our business is taxable at a high rate, our competitors could take it all away and only be liable for a tax of one-twentieth of one per cent.

C. B. Turley.

Subscribed and sworn to before me this 24th day of January, 1931. Herbert M. Scott, Notary Public, Jefferson County, Ky. My commission expires July 5, 1933.

[fol. 376] Newport

AFFIDAVIT OF MILTON MARX

STATE OF KENTUCKY,
Campbell County, ss:

Milton Marx, being first duly sworn, makes the following statement under oath:

My name is Milton Marx and I live on Marion Avenue in Cincinnati, Ohio.

I am a member of the partnership of Louis Marx and Brothers. We conduct retail stores for the sale of furniture in the cities of Covington and Newport, Kentucky, and I have had charge of the Newport store for the last forty years. Because of my experience in business in the city of Newport, I am familiar with the general retail situation in that city. I am acquainted with the location and type of all the larger retail stores in Newport, and I had an opportunity to, and have observed the nature, extent and character of their businesses.

In my opinion there is not a single store in the city of Newport which has sales over $400,000.00. There are some merchants, however, in this city who have sales in Kentucky which exceed $400,000.00, but this volume is only caused by virtue of the fact that they operate stores in the city of Covington in addition to the store operated by them in the city of Newport. In my opinion the number of such merchants does not exceed five.

Milton Marx.

Sworn to before me and subscribed in my presence this tenth day of February, 1931. I. V. Guy, Notary Public. My commission expires January 27, 1932. (Seal.)

[fol. 377] AFFIDAVIT OF DANIEL M. COHEN

STATE OF OHIO,
Hamilton County, ss:

Daniel M. Cohen, being first duly sworn, makes the following statement under oath:

My name is Daniel M. Cohen and I live at Cincinnati, Ohio.

I am a Director of The Dan Cohen Shoe Company. This corporation conducts retail stores for the sale of shoes and I have charge of the store operated by it at No. 24 Pike Street, Covington, Kentucky. Because of my experience in business in the City of Covington, I am familiar with the general retail situation in that city. I am acquainted with the location and type of all the larger retail stores in Covington and I have had an opportunity to and have observed the nature, extent and character of their businesses.

In my opinion, and to the best of my knowledge, there are only three stores in the City of Covington which have sales over $400,000.00 in their Covington, Kentucky, stores.

Daniel M. Cohen.

[Duly verified.]

[fol. 378] Paducah

AFFIDAVIT OF H. C. AMSTUTZ

COUNTY OF McCRACKEN,
State of Kentucky:

H. C. Amstutz states that he is the manager of the J. C. Penney Company retail dry goods store at Paducah, Kentucky; that he has been a resident of said city since January 1, 1928; that by virtue of his employment he is familiar with the general retail situation in the city of Paducah and particularly with the retail dry goods and specialty business in said city; that he is familiar with the location, management and type of the various other stores in said city; that he has had an opportunity to observe the amount and character of their business; that basing his opinion upon these various factors and his own experience and general knowledge of the retail trade and by comparison with his own store and sales therein he is able to estimate the sales made by the particular stores hereinafter mentioned. Affiant states:

1. That the Paducah store of the J. C. Penney Company is divided into the following departments, to-wit:

A. Wash Goods, Draperies, Rugs and House Furnishings.

C. Knitwear—All kinds including Hosiery, underwear, and Lingerie.

[fol. 379] D. Better dress and Silk yard fabrics.

E. Women's and children's Ready-to-Wear, including Coats, dresses and accessories.

F. Complete line of rubber, Felt and Leather Footwear for the entire family.

G. Toilet articles, notions and miscellaneous accessories.

H. Men's and boys' clothing.

K. Women's Millinery, Men's Hats and caps.

L. Work Clothes, dress shirts and general haberdashery.

2. That the names and estimated gross sales and number of employees of all other department and specialty retail stores known to affiant in the city of Paducah are as follows, to-wit:

	Estimated sales
Paducah, Dry Goods Company	$350,000
Rudy's Department Store	250,000
Lowenthal Ready-to-Wear	80,000
Wallerstein Men's Shop	90,000
Weille's Men's & Women's Apparel	200,000
Finkle Store	100,000
Bright Bros.	100,000
Guthrie Dept. Store, F. W. Woolworth Co., Montgomery Ward Co., Kresge Co., Sears, Roebuck & Co., W. T. Grant & Co., New System Dept. Store	Excess of 50,000
Approximately 10 others	Below 50,000

3. That of the other retail merchants in the city of Paducah in other lines than dry goods and specialties as set out above, there are the following:

[fol. 380]

Name and type of store	Estimated sales in excess of
None	$1,000,000
"	900,000
"	800,000
"	700,000
"	600,000
"	500,000
"	400,000

Approximate number below 400,000 as shown by directory.

4. That affiant has lived in the city of Paducah with his family, and now owns his own home, since January 1, 1928.

That he is a member of the following local civic organizations:

Rotary Club.
Member of Local Masonic Lodge.
Manager and Wife member of Local Eastern Star.
Entire family liberal contributing members of local Church.
Red Cross.
Member of Municipal Golf Club.
Member of Y. M. C. A. (just recently closed).
Retail Merchants Association.

5. That the Paducah store of the J. C. Penney Company has contributed to the following organizations and charities during the year 1930 in the amounts set op-osite to their names:

[fol. 381] Cousin Molly	$15.00
Volunteer Prison League	10.00
Paducah Board of Trade	25.00
Paducah Boy Scouts	25.00
Christian Record Publishing Co	2.00
Augusta Tilghman High School	5.00
Kentucky Children Home Society	3.00
Noble Park Playground	50.00
McKee Button Factory (New Industry Committee)	35.00
Retail Merchants Association	49.50
Salvation Army	5.00
Cumberland Presbyterian Church	2.50
Cousin Molly Milk Fund	5.00
Retail Merchants Ass'n (Fire Convention Funds)	4.00
Kentucky Progress Commission	25.00
Mammoth Cave National Park Association	50.00
Paducah, Mother Club	5.00
American Red Cross	5.00
Settlement House	5.00
McCracken County Public Health League	15.00
Christmas Decoration—Main Street	12.50
Total	$353.50
City License	50.00
	$403.50

6. That affiant, as manager of the Paducah store of the J. C. Penney Company, has charge of practically all matters relating to said store as though he was the sole proprietor thereof; that he keeps a bank deposit on behalf of the J. C. Penney Company in a local bank at Paducah from which he pays the employees of the store and other expenses and remits at intervals to the J. C. Penney Com-
[fol. 382] pany head office; that he has charge of all buying and the selection of all merchandise for the Paducah store from the general purchases of the J. C. Penney Company buyers; that he determines what lines and what departments he can handle to the best advantage and all other matters of local concern.

That each department in the Paducah store is run practically apart from other departments, as though it was itself a separate store, competing with similar departments in other stores and with specialty stores selling that character of goods exclusively. For example: The millinery department competes with purely millinery stores, the shoe department with shoe stores, the men's furnishings department with haberdashery stores, etc.

That each department is charged, in bookkeeping, with its floor space, its proportion of advertising, payroll, taxes, rent, heat, light and other items of general overhead expense like so many separate stores under one management.

That no department in the Paducah store has sales in excess of $400,000.00, the sales for the whole store aggregating only $312,400.00 for the year 1930; that the sales since March 17, 1930, for the remainder of the year amount to approximately $262,140.00; that if each department was taxed only as a separate unit the minimum rate of 1/20th of one per cent would be applied to sales in said store, whereas by virtue of the fact that the departments are op-
[fol. 383] erated by the same company and not by different owners and by virtue of the fact that the J. C. Penney Company owns twenty-one stores in the State of Kentucky the tax chargeable to said Paducah store amounts to almost 1% of its entire gross sales, and considerably more than 1% of the net sales thereof; that said tax amounts to almost twenty times the amount paid by practically all of affiant's competitors.

Affiant states that under his contract as manager of the Paducah store for the J. C. Penney Company, he receives

a percentage of the profits of said store in addition to his salary; that he is further given the privilege of purchasing stock in the said company at a price below the current market quotations thereon with the result that he is practically a partner with his employer in the operation of said store; that the imposition of this tax would directly affect the income which affiant receives from said business by reducing the profits therefrom and also reducing the amount of sales made by said store due to the inability of said store to meet competition in various highly competitive lines if this tax must be added to the price of articles sold in said lines.

Affiant states that all of the foregoing statements are true, as he verily beli-ves.

H. C. Amstutz.

[fols. 384-388] Lexington

AFFIDAVIT OF L. M. ROSS

COUNTY OF FAYETTE,
State of Kentucky.

Mr. L. M. Ross states that he is the manager of the J. C. Penney Company retail dry goods store at Lexington, Kentucky; that he has been a resident of said city for more than three months.

* * * * * * *

[fol. 389] Lexington

AFFIDAVIT OF DOLPH WILE

COUNTY OF FAYETTE,
State of Kentucky, ss.

Dolph Wile, being first duly sworn states:

I am the President and chief officer of the Wolf-Wile Company of Lexington, Kentucky. The Wolf-Wile Company operates the largest retail department store in Lexington. I have been in the department store business for thirty years and was one of the organizers of the Wolf-Wile Company.

By virtue of my employment and experience in the department store business and in the retail dry goods business, I am familiar with the general retail situation in the City of Lexington, Kentucky. I am familiar with the location, management and type of the various other stores in Lexington and over a period of a great many years I have had an opportunity to observe the amount and character of their business. Basing my opinion upon these various factors and my own experiences and general knowledge of the retail trade, and by comparisons with my own store and the sales made therein, I am qualified to estimate the sales made by the particular stores herein mentioned.

I have made a survey of the City of Lexington using the classified telephone directory as a basis for obtaining the [fol. 390] names of the various stores, and in my opinion the following are the only stores in the City of Lexington, having annual sales in excess of $400,000.00:

Name of store		Estimated annual sales
Denton Co.	Department Store	$500,000.00
J. D. Purcell Co.	" "	900,000.00
Brower & Co.	Furniture	400,000.00
Fred Bryant	Automobiles (Chevrolet)	500,000.00
Jess Frazer	Automobiles (Ford)	500,000.00
Graves-Cox & Co.		450,000.00
Wolf-Wile Co.		900,000.00

Basing my opinion as aforesaid I estimate that there are approximately 650 other retail stores in said city having annual sales of less than $400,000.00.

I have read the affidavit of Mr. Robert J. McKim, President of the Stewart Dry Goods Company in Louisville, and the facts which he has set out therein in regard to the discrimination against department stores under the 1930 Kentucky Sales Tax Law are true in principle, and are applicable to the situation in Lexington, in the same manner in which he has demonstrated their application to the City of Louisville.

Dolph Wile.

Subscribed and sworn to before me by Dolph Wile this 4th day of February, 1931. My commission expires on the 18th day of October, 1934. Hattie Mitchell, Notary Public, Fayette County, Kentucky. (Seal.)

[fols. 391 & 392] Ashland

AFFIDAVIT OF C. H. PARSONS

COUNTY OF BOYD,
State of Kentucky, ss:

C. H. Parsons, being first duly sworn states:

I am the President and chief officer of The Parsons-Faulkner Company of Ashland, Kentucky.

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[fols. 393-397] Bowling Green

AFFIDAVIT OF C. R. LEININGER, BOWLING GREEN, KY.

COUNTY OF WARREN,
State of Kentucky:

C. R. Leininger states that he is the manager of the J. C. Penney Company retail dry goods store at Bowling Green, Kentucky; that he has been a resident of said city for more than one year.

* * * * * * *

[fols. 398-404] Corbin

AFFIDAVIT OF E. R. PROBASCO, CORBIN, KENTUCKY

COUNTY OF WHITLEY,
State of Kentucky:

E. R. Probasco states that he is the Manager of the J. C. Penney Company retail dry goods store at Corbin, Kentucky; that he has been a resident of said city for more than eleven months.

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[fols. 405-409] Frankfort

AFFIDAVIT OF B. E. VAN ANTWERP

COUNTY OF FRANKLIN,
State of Kentucky, ss:

B. E. Van Antwerp states that he is the manager of the J. C. Penney Company retail dry goods store at Frankfort, Kentucky; that he has been a resident of said city for more than five years.

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[fols. 410-414] Henderson

AFFIDAVIT OF W. H. HOWELL, HENDERSON, KY.

COUNTY OF HENDERSON,
State of Kentucky:

W. H. Howell states that he is the manager of the J. C. Penney Company retail dry goods store at Henderson, Kentucky; that he has been a resident of said city for more than 1½ years.

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[fols. 415-419] Hopkinsville

AFFIDAVIT OF E. C. PURVIS, HOPKINSVILLE, KY.

COUNTY OF CHRISTIAN,
State of Kentucky:

E. C. Purvis states that he is the manager of the J. C. Penney Company retail dry goods store at Hopkinsville, Kentucky; that he has been a resident of said city for more than seven years.

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[fols.420-424] Maysville

AFFIDAVIT OF M. S. GESLEY, MAYSVILLE, KY.

COUNTY OF MASON,
State of Kentucky:

M. S. Gesley states that he is the manager of the J. C. Penney Company retail dry goods store at Maysville, Kentucky; that he has been a resident of said city for more than seven years.

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[fols. 425-429] Middlesboro

AFFIDAVIT OF A. C. MILLER, MIDDLESBORO, KY.

COUNTY OF BELL,
State of Kentucky:

A. C. Miller states that he is the manager of the J. C. Penney Company retail dry goods store at Middlesboro, Kentucky; that he has been a resident of said city for more than three years.

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[fols. 430-435] Owensboro

AFFIDAVIT OF O. A. RHODES, OWENSBORO, KY.

COUNTY OF DAVIESS,
State of Kentucky:

O. A. Rhodes states that he is the manager of the J. C. Penney Company retail dry goods store at Owensboro, Kentucky; that he has been a resident of said city for more than 7 years.

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[fols. 436-441] Central City

AFFIDAVIT OF W. T. MORGAN, CENTRAL CITY, KY.

COUNTY OF MUHLENBERG,
State of Kentucky:

W. T. Morgan states that he is the manager of the J. C. Penney Company retail dry goods store at Central City, Kentucky; that he has been a resident of said city for more than one year.

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[fols. 442-447] Georgetown

AFFIDAVIT OF W. G. JENKINS

COUNTY OF SCOTT,
State of Kentucky, ss:

W. G. Jenkins states that he is the manager of the J. C. Penney Company retail dry goods store at Georgetown, Kentucky; that he has been a resident of said city for more than one year.

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[fols. 448-452] Madisonville

AFFIDAVIT OF ROBERT WRIGHT, MADISONVILLE, KY.

COUNTY OF HOPKINS,
State of Kentucky:

Robert Wright states that he is the manager of the J. C. Penney Company retail dry goods store at Madisonville, Kentucky; that he has been a resident of said city for more than seven months.

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[fols. 453-458] Mayfield

AFFIDAVIT OF H. H. CRAVEN, MAYFIELD, KENTUCKY

COUNTY OF GRAVES,
State of Kentucky, ss:

H. H. Craven states that he is the manager of the J. C. Penney Company retail dry goods store at Mayfield, Kentucky; that he has been a resident of said city for more than five years.

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[fols. 459-464] Mt. Sterling

AFFIDAVIT OF T. B. JONES, MT. STERLING, KENTUCKY

COUNTY OF MONTGOMERY,
State of Kentucky, ss:

T. B. Jones states that he is the manager of the J. C. Penney Company retail dry goods store at Mt. Sterling, Kentucky; that he has been a resident of said city for more than fifteen years.

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[fols. 465-470] Paris

AFFIDAVIT OF P. O. WOLVERSON, PARIS, KENTUCKY

COUNTY OF BOURBON,
State of Kentucky, ss:

P. O. Wolverson states that he is the manager of the J. C. Penney Company retail dry goods store at Paris, Kentucky; that he has been a resident of said city for more than two years.

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[fols. 471-475] Princeton

AFFIDAVIT OF C. W. GOWIN, PRINCETON, KENTUCKY

COUNTY OF CALDWELL,
State of Kentucky, ss:

C. W. Gowin states that he is the manager of the J. C. Penney Company retail dry goods store at Princeton, Kentucky; that he has been a resident of said city for more than one year.

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[fols. 476-480] Richmond

AFFIDAVIT OF B. E. WILLIS, RICHMOND, KENTUCKY

COUNTY OF MADISON,
State of Kentucky, ss:

B. E. Willis states that he is the manager of the J. C. Penney Company retail dry goods store at Richmond, Kentucky; that he has been a resident of said city for more than four years.

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[fols. 481-486] Winchester

AFFIDAVIT OF J. D. DELANO, WINCHESTER, KENTUCKY

COUNTY OF CLARK,
State of Kentucky, ss:

J. D. Delano states that he is the manager of the J. C. Penney Company retail dry goods store at Winchester, Kentucky; that he has been a resident of said city for more than three years.

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[fols. 487-492] Glasgow

AFFIDAVIT OF J. A. GUDE, GLASGOW, KY.

COUNTY OF BARREN,
State of Kentucky:

J. A. Gude states that he is the manager of the J. C. Penney Company retail dry goods store at Glasgow, Kentucky; that he has been a resident of said city for more than one year.

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[fols. 493-508] Lancaster

AFFIDAVIT OF B. A. AISTROP, LANCASTER, KENTUCKY

COUNTY OF GARRARD,
State of Kentucky:

B. A. Aistrop states that he is the manager of the J. C. Penney Company retail dry goods store at Lancaster, Kentucky; that he has been a resident of said city for more than one year.

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[fol. 509] AFFIDAVIT OF PAUL H. NYSTROM

STATE OF NEW YORK,
County of New York, ss:

Paul H. Nystrom, being first duly sworn, made the following statement under oath:

I reside in New York and am fifty-three years of age. I am a graduate of the University of Wisconsin and also hold the degrees of Master and of Doctor of Philosophy from the same institution. I am a professor of marketing in the School of Business of Columbia University. The School of Business is a college of equal rank with the colleges of law, medicine, engineering, and others making up the University. As a professor of marketing it is my duty

to conduct courses in marketing including general marketing, retail merchandising, and studies in consumer demand, as well as to guide advanced or graduate students in their research in problems of marketing. In addition to my educational work I also devote considerable time to market analysis for and consultation with private businesses. My clients include manufacturers, wholesalers, and retailers.

My experience began at the age of fifteen as an employee in middle western country general merchandise stores for four years. This was followed by positions as teacher and principal successively in country, village, and city schools for a period of six years. During these years I was constantly employed out of school hours and during vacation [fol. 510] periods in commercial activities. From 1909 to 1914 I was a member of the Faculty of the University of Wisconsin rising in that period to the grade of Assistant Professor of Political Economy. During three successive years, 1906-1908, while in educational work in Wisconsin, I also served as special investigator for the Wisconsin State Tax Commission. During the school year 1914-1915 I served as Associate Professor of Economics in the University of Minnesota. I resigned my position there in the spring of 1915 and took up work as assistant to the president on marketing problems in the U. S. Rubber Company, New York City. In June, 1917, I was appointed director of research and later sales manager of the International Magazine Company, publishers of Cosmopolitan, Good Housekeeping, and four other well-known magazines of national circulation. From January, 1921, down to June, 1927, I was managing director of the Retail Research Association, a co-operative group of eighteen independent department stores with headquarters in New York. On leaving the Retail Research Association in 1927 I was appointed to the Faculty of the School of Business of Columbia University and took up my present activities in education and business consulting.

I am the author of several books including the "Economics of Retailing," first published in 1915, but revised twice since, a book which has served as a standard text in educational institutions and as a practical guide to men in business since it was first issued. Among the other books of which I am the author are the "Economic Principles of Consumption," "Economics of Fashion," "Retail Selling and Store Management," and a pamphlet published by the

[fol. 511] Chamber of Commerce of the U. S. on "Chain Stores." I am also the author of the articles on marketing appearing in the Twelfth, Thirteenth, and Fourteenth editions of the Encyclopedia Britannica. Besides the foregoing I have also written many articles on marketing for periodicals and have lectured frequently before trade and business groups on the same subject.

In the course of my studies on marketing which have been carried on for a period of over twenty years, I have been much interested, both from a practical and theoretical standpoint, in the development of the chain store systems and their effects upon business and upon public welfare in general.

I have read the Kentucky Gross Sales Tax Law and have given careful thought to its effects if permitted to remain in force in that state. The following represent my conclusions concerning the operation of the law.

The Kentucky Gross Sales Tax Law seems to assume either or both that:

1. As the volume of sales in retail concerns increases beyond $400,000 a year there is an increasing rate of net profit and therefore ability to pay increasing rates of taxes.

2. Retail concerns having a sales volume in excess of $400,000 a year are responsible for the decline in number of small independent retailers and that for this they should be regulated, checked, or punished. Both of these assumptions are incorrect.

One of the marked characteristics of the retail trade as compared with manufacturing and other industries is that [fol. 512] with certain exceptions, costs of operation do not decline when sales increase. In stores having but very small sales the expenses of operation, when properly charged, do run higher than the average, but when a retail store has reached a certain volume of business which varies according to lines handled and services rendered, but which for purposes of illustration may be said to amount to about $25,000 in sales per year in grocery stores and somewhat more than that in drug stores and hardware stores, a minimum cost of doing business is reached. Beyond this point increases in sales volume are usually accompanied by increases in expenses of operation so that the rates of expenses in larger stores are rarely less than in the smaller stores doing the

same kind of business and that have reached a point of efficient operation. Indeed the rates of expenses in concerns with higher sales are usually higher. Accurate compilations of retail store expense figures are available in support of this statement, such as the reports of the Harvard Bureau of Business Research on operating expenses in retail grocery stores, shoe stores, department stores, specialty stores, stationery and office supplies; the reports of the Bureau of Business Research of the State University of Iowa on grocery stores and the reports of the National Association of Retail Clothiers and Furnishers on men's clothing. In the reports of hundreds of retail stores compiled and presented in the foregoing there is a well established indication that, after some minimum sales point has been reached, which represents the necessary amount for efficient retail operation, the rates of expenses tend to rise as retail sales [fol. 513] increase. There are a few retail lines in which there seems to be an exception to this rule just mentioned, such as in the hardware and the retail building material business, in both of which it appears that the rates of expenses of operation tend to decline slightly as the sales volumes increase. In all such cases, however, there are strong possibilities that the declines in expense rates found in concerns with larger sales may be due to differences in lines handled and services rendered. Thus, a hardware dealer with a large volume of sales may and does often include heating and roofing contract work, the sale of automobiles and agricultural implements, and even wholesaling to local industries. These special forms of selling require less expense per dollar of sales and naturally tend to reduce the rates of expenses for the whole business.

It is a fairly well established fact that in retail businesses of the same kind, selling the same kinds of goods and offering the same services, the rates of expenses tend to increase as sales volumes rise. The reason for this difference in expense trends in the retail business compared with costs of operation in manufacturing and other industries is that the typical unit operation in retailing is the making of a sale to an individual customer and this most important part of retail store operation has never been and probably can never be reduced to the routine, the time and labor saving operations, characteristic of the mass production methods of a factory. Thus, the final cost of selling and delivering the

goods to the ultimate consumer tends to remain constant no matter what the size of business. There are economies [fol. 514] in large retail institutions such as come from the distribution of general items of overhead expense over increasing sales, including rent, interest, heat, light, etc., but these savings are counterbalanced, by the increases in expense due to additional supervision and record keeping required to maintain a large retail concern in efficient operation.

Since the rates of expense tend to rise with increases in sales volume in retail businesses of the same kind rendering the same types of services; the advantage in increasing sales lies in increasing purchasing power of the larger concern and thereby enabling it to buy its goods in larger quantities and at lower prices. To meet this advantage of the larger stores smaller, independent retailers are uniting in large numbers for purposes of co-operative purchasing.

The most important factor in the earning of net profits in retailing as well as in every other business is managing ability. There are wide differences in actual net profits earned in all kinds of retail businesses and in all sizes of such businesses. There are numerous instances of retail concerns with small sales volumes who are able to earn high rates of net profit. Such energy and ability in the smaller concern leads to its growth. Many of the larger retail concerns, though not without exceptions, represent higher average efficiency in operation. The range in managing ability is greater among small independent retailers than among concerns with large sales, but there are important differences in operating efficiency and net profit earning capacity in the large concerns as well. High net [fol. 515] profits in the retail business are almost invariably the result of good management and not of size of concern or volume of sales.

It would be inaccurate to judge the chain store movement by the published statements of a few chain store systems, even of the leaders. There are well over eight thousand chain systems in the U. S. of which the sales records and statistics of operation of less than 100 are available. Of the seventy or more well known chain store systems several have enjoyed unusually high net profits for the following reasons:

They have offered new and desirable varieties of goods and new services at new or different price lines not covered by the older retail dealers and have as a consequence grown rapidly and have earned very high profits. As an illustration, the 5 and 10 cent stores sell a hammer for ten cents, something unavailable at that price in the regular hardware stores before the chain stores came into existence. True, this ten cent hammer has very few of the qualities of a Maydole or a Plumb hammer, but it serves its purpose for many people who do not need a better quality hammer and the fact that it can be bought for ten cents instead of seventy-five cents or a dollar makes it a highly useful service to the public. Anyone may see on passing through the 5 and 10 cent chain stores, and many others as well, that much of the merchandise handled is not precisely competitive with the merchandise formerly found in the regular stores, but is of a different class and price level. The chain store systems have through their initiative in developing these new lines of trade earned and are entitled to their growth and success.

[fol. 516] High net profits characterize all new and successful business enterprises but the high profits likewise attract and develop competition. The small regular independent retailers have learned and are learning the methods of the chains. They are adapting these methods to their own use and, as a result, are able not only to hold their own against chain stores, but, as has been amply proved in a great many communities, are able to outsell their chain store neighbors. An examination of chain store trends during recent years has led many competent students of business to the conclusion that their era of pioneering and of high profits has already passed its peak and may henceforth be expected to decline. This does not mean that chain stores may not continue to grow, but it may mean that their growth will be much less spectacular in the future. Certainly the chain store systems taken as a whole have given no indication of any special ability to withstand the stress of business depressions any better than independent retailers. The chain store method of operation is not a sure road to profit-making success.

The belief that chain store organizations are in some way responsible for the high mortality rate among small independent retailers as well as for the decline in impor-

tance of many small trading centers needs but a little analysis to show its fallacy. The failure rate among small independent retailers has always been high and long before chain store systems appeared in our system of distribution. As early as 1840, General Henry A. S. Dearborn, then collector of the port of Boston, in an address before the Massachusetts Legislature, stated: "After an [fol. 517] extensive acquaintance with business men and having long been an attentive observer of the course of events in the mercantile community, I am satisfied that among one hundred merchants and traders not more than three in this city ever acquire independence."

In 1870's, David A. Wells, a well known American economist of that period, estimated that at least ninety per cent of those who go into the retail business fail.

In his testimony before the Industrial Commission in 1900, John Wanamaker stated that only about four per cent of all who embark in mercantile business succeed. He also quoted A. T. Stewart, a great New York merchant, who died in 1876, who had claimed that only two per cent of all retail dealers succeeded. Much similar evidence might be added.

Certainly the present failure rate among retailers is no higher than, if indeed as high as, it was in these earlier years. This statement is based on studies made by myself and described in "Economics of Retailing," Vol. I, Chap. XIV, "Failure Rate in the Retail Business," and by Professor E. D. McGarry of the University of Buffalo in his "Retail Trade Mortality."

With respect to the decline in importance as trading centers of many small towns throughout the country it is obvious that this decline has had little or nothing to do with the chain store development and would certainly have taken place had there never been any chain stores. The main reason for the decline of trade in the smaller towns is, of course, the increased facility of transportation by rail, especially by good roads and automobiles, and more recently by cheap bus fares. With the present develop- [fol. 518] ment of good roads and the common use of automobiles in the state of Kentucky there cannot be many families who are more than two or three hours riding distance from a good sized city either within or outside of the state. It is attractions of the larger cities that have caused

the trade in smaller towns to decline. The chains have had but little to do with this major movement. In fact, the coming of chain stores to small towns has in many cases helped to re-create the trade of those towns and to hold it from going to larger cities.

It is frequently alleged that the independent retailers in the smaller towns provide a substantial leadership in political, civic, social, religious, and educational interests which is broken down by the growth of the chain store systems. There are many independent retailers who do serve their communities slendidly, but it would be an error to assume that all or even a majority of independent retailers provide such excellent service to their communities. Most of them do not. How could it be otherwise? It must be borne in mind that a very large proportion of independent retailers have very insignificant businesses and, while the volume of business done is, of course, not a direct measure of the importance of the retailer in his community it may safely be taken as a rough guide. According to the trial census of distribution taken by the U. S. Bureau of the Census in 1927, covering eleven American cities, it was found that 28% of all of the independent retailers had sales volumes of less than $5,000 a year; 46% had sales of less than $10,000 a year; and 74% had a business of less than $25,000 a year. Obviously, with retail sales of less [fol. 519] than $5,000 or even less than $10,000 a year there can be no satisfactory economic business unit. Clearly, most of these small concerns are merely trial efforts, a fringe or margin of concerns recently established, of concerns about to give up business, or of concerns desperately trying to maintain a place in the distributive mechanism. A few of such small concerns eventually become larger and successful. Most of them eventually give up the struggle only to be followed by a constant stream of new beginners. These conditions clearly illustrate that most retailers are not and cannot be important factors in their communities. These conditions also explain why there is such a high failure rate as that which has always prevailed in the retail field. The chain store system of distribution is not responsible for these conditions for these conditions existed long before the chain stores were ever heard of. The chain store systems merely serve as a convenient but fallacious

excuse for the present rapid turnover of such retailers. Back in the years from 1905 to 1915 the mail order houses were blamed for the decline of small towns and the high failure rate of small independent retailers. In an earlier period, from 1895 down to 1905, many small retailers tried to place the responsibility for their failures on the department stores, that were then coming into prominence. After the present agitation about chain store systems has passed away I have no doubt but that some new reason will be advanced.

There is ample evidence that independent retailers do not need special protection against the chain store systems. There are thousands of independent retailers, small as well [fol. 520] as large, who have amply demonstrated during recent years their ability to meet the competition of chain stores successfully. The elements of effective retailing are the same for all classes of retail institutions. They include convenient location, suitable building and equipment, carefully selected stocks of merchandise such as people want, fair competitive prices, good, clean housekeeping and attractive display, courteous, intelligent sales service, suitable forms of publicity and enough capital to finance the store, its purchases of goods and, where credits are granted, to carry customer accounts. There is not a single element in this list in which independents cannot by the application of intelligence and energy do as well as, or better than, chain systems excepting possibly in the purchase of goods and in the use of certain forms of advertising. Chain store systems as well as larger stores, as is well known, are able to purchase larger quantities of all goods handled and consequently to buy them for less. The independent retailer cannot on his own secure this advantage, but by combining with a sufficient number of other retailers for the purpose of purchase of goods he can do as well as the chains. There has been a very rapid development in this direction. Considering but one field alone, more than 60,000 retail grocers throughout the country, and a proportionate number of these in the state of Kentucky, now belong to such cooperative buying organizations and enjoy the advantages of quantity buying which was introduced by the department and chain store systems. Indeed with buying power equalized a great many independent retailers are able, through

[fol. 521] the exercise of good management in the conduct of their business, to meet the requirements of their respective communities more successfully than the chain stores. The size of the chain store system is both its strength and its weakness. It possesses buying power and operates under highly standardized methods but its very size makes it inflexible and prevents it from meeting the individual requirements of local communities. It is in this respect, particularly, that independent retailers have shown themselves superior to the competition of chains.

The chain store system of distribution which has grown up as a part of our present distribution of goods has had the effect of setting the pace for the improvement of retailing, for better and cleaner stores, for more efficient operation, for lower prices, and for closer attention to the requirements of consumers. This does not mean that chain stores either invariably or regularly sell for less than independent stores, although there have been some local studies indicating this effect. It seems sounder to assume that, considering differences in qualities of goods handled and varieties of services rendered, there are probably not now any important differences in the prices charged by chain stores and independent stores wherever they are in active competition. Everyone must grant, however, that had it not been for the advent of the chain stores retail store operation would still be conducted in old-fashioned ways, the expenses of operation would have been higher, there would have been more leaks and wastes in operation and prices of practically all commodities would have been higher to the public. Independent stores, both small and [fol. 522] large where managed by competent business men, are everywhere meeting the challenge of chain store competition and are giving as good or better merchandise and service at as low prices as the chain stores and the net result of this competition has been and is now enormously advantageous to the consuming public.

Chain store organizations are often criticized for their lack of interests in the civic and social affairs of the communities in which their stores are located. There has been some basis for this criticism. The earlier chain store operators have been so much taken up with the problems of the establishment and management of their new stores that

they have often forgotten that the success of their stores is, of necessity, dependent upon the success of the communities in which they are located. A chain store organization's interest in any community in which it has a store may not be so individual and particular as that of an independent retailer located in that community, but the chain store does have the same reasons for interest in the growth of the community as the independent. A more intelligent self-interest on the part of the chains is certain to result in a more active interest and participation in all community affairs. Some of the chain store systems have during recent years made serious approaches towards meeting this problem fairly and squarely and there is every reason to expect that others will follow their lead. The truth is that in many towns in which there are both chain stores and independent stores one now finds both chain store managers and independent retailers in increasing number working together for the welfare of their community.

[fol. 523] The Kentucky Gross Sales Tax Law provides for the assessment of a graduated tax against gross sales rather than net sales. Gross sales constitutes an unfair basis for the computation of such a tax for gross sales represent the total volume of business without taking into account returned goods, adjustments, and deductions which must occur to some extent in every retail business. There are, however, very wide differences in the amount of returns and allowances. They run considerably higher in clothing, furniture, floor coverings, and other kinds of home furnishings than in groceries and drugs. Returns run heavier in stores having a credit business and still heavier in instalment selling concerns than in all-cash businesses. Consequently the burden of this tax will fall heavier on certain kinds of businesses than on others. Furthermore it is the common experience in retailing that as the sales volume increases the volume of returns and allowances increases still more rapidly. In the report of operating results of department and specialty stores in 1929, Bulletin No. 83, Harvard Bureau of Business Research, page 46, it is shown that the amount of returns and allowances range from 1.7% for concerns with sales less than $150,000 and then regularly upward to 14% for concerns with sales of $10,000,000 or more per year. Under the terms of the Kentucky law the larger concerns with the heavier burdens of

returns and allowances would also have to bear heavier burdens of taxes not only on their actual net sales but also on their returns and allowances as well.

The incidence of the Kentucky Gross Sales Tax may be questioned. If the tax be added to the expenses of operat-
[fol. 524] ing and the retail prices raised so as to shift the tax to the consumer then the real burden of the tax will fall on people least able to bear it. By far the largest part of the total sales of chain stores as well as of department stores, the stores which would be most affected by this tax, is made to the masses of the people who have but very moderate means. Granting many individual exceptions, wealthier classes of the people do not, as a rule, constitute an important amount of patronage of any chain or department store. These larger sales organizations are large because they serve the masses. A large part of the income of the poorer people is expended for food and other necessities of life bought in retail stores, whereas the more well-to-do spend smaller proportions of their incomes in this way. It is clear that if the tax can be shifted, then the main burden would fall on the poorer people of the state.

It is debatable, however, whether the tax can be shifted to the customer. Retail prices, on most goods, are subject to very keen competition. Most housewives who buy the necessities of consumption sold by retail stores are very keen to notice price differences. Any attempt on the part of any retail dealer or group of retail dealers to raise their prices to cover the amount of this tax would be certain to meet a loss in custom. Even a one per cent difference in price, other things being equal, would result in a gradual transfer of trade. If the tax cannot be shifted then it places an inequitable burden on the concerns with the larger sales which, as we have pointed out, do not necessarily have greater ability to pay this tax.

[fol. 525] This tax falls progressively heavier upon concerns whose gross volume exceeds $400,000 a year. It reaches its heaviest burden at a million dollars a year and more. Retail organizations with low net profits will find the tax confiscatory. Any concern with sales in excess of a million dollars a year but with a net profit of less than 1% on sales will have practically its entire profit taken by the

tax. Less than 1% net profit on sales is not unusual in the retail trade. In the Harvard report, referred to above, the average profits reported by over 600 department stores and specialty stores for 1929 averaged less than 1%. This was for a year of good business conditions; for a year such as 1930 the average results for all types of mercantile institutions must be even much lower. Retail stores having net profits of less than 1% on net sales will find it more profitable in net results to limit their sales to about $400,000 a year rather than to make additional efforts to increase this volume and retail concerns already enjoying sales volumes of a million dollars or more but with net profits of 1% or less will find it to their advantage to close up a part of their businesses, dismiss many of their employees and dispose of a large part of their retail store facilities. By so doing, they will be money ahead.

The net effect of the Kentucky Gross Sales Tax Law if continued will be to penalize the larger concern for its size and, in effect, to subsidize smaller retailers regardless of their relative efficiency in operation or usefulness to society. This tax will discourage the growth of business beyond certain points and eventually defeat its own purpose. It does not seem conceivable that these effects could have been [fol. 526] given proper consideration by the legislature at the time the law was made.

One may sympathize with the efforts of the law-makers of the commonwealth of Kentucky in their struggle to shift the heavy tax burdens now carried by the people of that state, but a tax of the nature directed by this law, which falls so inequitably on a small proportion of concerns whose sales happen to exceed the arbitrary limit of $400,000 a year cannot possibly be the final answer. The tax cannot help but be detrimental not only to those individual concerns who must immediately bear its burdens but also to the progressive development of the state of Kentucky.

Paul H. Nystrom.

[Duly verified.]

[fol. 527] AFFIDAVIT OF JAMES R. KARIBO

STATE OF KENTUCKY,
County of Jefferson, ss.:

The affiant, James R. Karibo, being duly sworn, states:

I am Manager of Liggett's Drugstore, owned and operated by Louis K. Liggett Company, at 302 South Fourth Street in Louisville, Kentucky. I have held that position since the store was opened at that point on October 14, 1930.

The Louis K. Liggett Company owns and operates throughout the United States what is known as a system of chain drug stores, but it owns and operates only one drug store in the State of Kentucky.

As Manager of Liggett's Louisville Store, affiant, on February 4, 1931, received through the United States mail, in due course, the attached circular letter written upon a letterhead of the Kentucky Pharmaceutical Association, Secretary's Office, 228 West Main Street, Frankfort, Kentucky, which was enclosed and received in the attached envelope, postmarked as mailed at Frankfort, Kentucky, on February 3, 1931, at 6 P. M., and bearing the return address of J. W. Gayle, Secretary, Kentucky Pharmaceutical Association, 228 West Main Street, Frankfort, Kentucky. Such letter and envelope are filed herewith and made part of this affidavit, marked "Exhibit 1."

[fol. 528] The attached letter speaks for itself, as to its terms, and therefore affiant will make no comment upon it further than to say that the letter bears the fac simile signature of J. W. Gayle, Secretary of the Kentucky Pharmaceutical Association, with which signature affiant is familiar because he has repeatedly seen it upon the licenses issued to registered pharmacists employed in the drug store managed by affiant, said licenses being issued and signed by said J. W. Gayle in his capacity as Secretary of the State Board of Pharmacy of Kentucky.

James R. Karibo.

Subscribed and sworn to before me by James R. Karibo this 5th day of February, 1931. My commission expires March 4, 1934. Lilly R. Warren, Notary Public, Jefferson County, Kentucky.

EXHIBIT 1.

[Kentucky Pharmaceutical Association]

January 16, 1931.

To the Druggists of the State of Kentucky:

The retail sales tax law (anti-chain store bill) is being contested in the courts. If the courts decide against us it will be a victory for the chains and will cost you plenty. Read this letter and act quickly.

At the last session of the Kentucky Legislature that august body passed a retail sales tax law. That law is effective now and Kentucky merchants are compelled to file a [fol. 529] schedule during January of 1931 indicating their sales for 1930.

This new law subjects you to the payment of a sales tax as follows:

1/20 of 1% on the first $400,000 of sales.
2/20 of 1% on the next 100,000 of sales.
5/20 of 1% on the next 100,000 of sales.
8/20 of 1% on the next 100,000 of sales.
11/20 of 1% on the next 100,000 of sales.
14/20 of 1% on the next 100,000 of sales.
17/20 of 1% on the next 100,000 of sales.
1% on all sales over $1,000,000.

The sliding scale, as indicated above, was inserted in the measure for our benefit. Credit for special license taxes was also made a part of the measure to lessen our burden under the act.

For instance: If you pay $5.00 to operate a soda fountain; $10.00 to handle tobacco and $10.00 to handle soft drinks and ice cream, this $25.00 or any part thereof, may be deducted from the amount of tax you may be subject to under the new law. Prescription liquor sales are not taxable. State restaurant license and playing card licenses are also deductible from the tax.

To illustrate: If your sales are $50,000 annually, your sales tax, according to the above schedule of 1/20 of 1%, would be $25.00. If you paid the three special licenses referred to heretofore, you will be given a credit of $25.00, consequently you will file a return showing your sales and

by taking advantage of your credits the account will balance and you will pay nothing under the new law.

[fol. 530] If the sliding scale had not been adopted and credits were not allowed for special licenses, the tax would have been as follows:

1% of sales on $50,000 business or $500.00 tax.

If your business amounts to $25,000 annually you would have been subject to a tax of $250.00. Using $25,000 as a basis of sales and with the schedule finally adopted of 1/20 of 1% your tax will be $12.50, subject of course to the deduction of any special licenses you might pay.

Any one knows that the State Legislature has a perfect right to instigate any legislation to take care of the state government expenses.

One half of the amount derived from this tax is to go to the Penal and Charities Board for the upkeep and extension of our penal and charitable institutions. The other half of the money derived under the law will go to retire the state debt.

The law is being contested in both State and Federal courts and will unquestionably be carried to the Supreme Court of the United States. Those who are seeking to prove that the law is unconstitutional are taking it into the courts on the grounds that the sliding scale is discriminatory and thereby violates both the State and Federal Constitutions.

In order to do this we must have funds to protect the law in the courts. The case has already been heard in the Franklin Circuit Court but no decision has as yet been handed down. Another suit has been filed in the United States District Court at Covington. One of the courts will [fol. 531] no doubt throw the case out on the grounds that it has no jurisdiction or the cases will be consolidated. The battle is being waged on the sliding scale end of the law and if the independent trade does not supply legal talent to defend the sliding scale the measure will have no champion. The opponents (chain stores) will use the best legal talent money can buy to set the law aside.

Each merchant in the State of Kentucky *MUST* subscribe $2.00 in order that we may engage the proper legal talent and thereby insure the independent merchants of this commonwealth appropriate representation in presenting its argument that the sliding scale is constitutional and should be upheld.

If this sliding scale is thrown out there is no doubt but what a flat 1% sales tax law will be enacted and then the independents will be subject to the maximum tax instead of the minimum tax as is in evidence in the sliding scale.

Firms having two or more stores must couple their sales as one individual firm or institution. You can therefore readily see that chain institutions will be subject to the maximum tax while the independent will be subject to the minimum tax.

Our investigation has shown that very few independent retailers enjoy business in excess of $400,000. Our further investigation indicates that 90% enjoy a volume of less than $50,000, hence 90% of the independents will pay nothing under this new law and 10% will pay a very small tax. What a wallop the chains get by having to pay the maximum [fol. 532] of 1% under the sliding scale.

We know that one chain institution alone will be subject to a tax under this new law in excess of $150,000.

The case was taken into the courts last week and the emergency calls for immediate action. Arrangements have been made for proper legal talent to represent the independents interests. Your share in this is $2.00. Send it now. Do not wait a day. It is either pay $2.00 now or many, many times that amount later.

Action please!

Very truly yours, J. W. Gayle, Secretary.

P. S.—Make all checks payable to the Kentucky Pharmaceutical Association and mail to J. W. Gayle, Secretary, Frankfort, Kentucky.

[Envelope]

After 5 days, return to J. W. Gayle, Secretary, Kentucky Pharmaceutical Association, 228 West Main Street, Frankfort, Ky.

Frankfort, Ky., Feb. 3, 1931, 6 P. M.
Liggetts Drug Store, 302 S. 4th Str., Louisville, Ky.

[fol. 533] AFFIDAVIT OF N. A. BASH

STATE OF KENTUCKY,
County of Jefferson, ss:

The affiant, N. A. Bash, being duly sworn, states:

I am District Manager at Louisville, Kentucky, of the Hook Drug Company, which operates five retail drug stores in Louisville, Kentucky, four known as Hook Drug Company stores and one known as the E. H. Bennett Drug Company store, these being the only stores operated by it in the State of Kentucky. I have held my position since September, 1927.

The Hook Drug Company owns and operates in Kentucky and Indiana what is known as a system of chain drug stores, embracing 38 stores in Indiana, to which should be added 5 stores in Louisville, making 43 stores in all operated by it.

I am a registered pharmacist in Kentucky, and by virtue of such registration I am, pursuant to Section 2627, Kentucky Statutes, a member of the Kentucky Pharmaceutical Association, which includes all registered pharmacists in the State.

I have read the affidavit of James R. Karibo and the circular letter attached thereto as "Exhibit 1," which is addressed under date January 16, 1931, "To the Druggists of the State of Kentucky" and signed by J. W. Gayle, Secretary, on behalf of the Kentucky Pharmaceutical Association, the said Gayle being also Secretary of the State Board [fol. 534] of Pharmacy of Kentucky. By way of explaining the circumstances under which said circular letter was sent out, affiant makes the following statement:

In the retail drug trade in Louisville and in the larger cities of Kentucky there is keen competition among the so-called "National Chains," several of which own and operate retail drug stores in Kentucky, namely, Hook's, Walgreen's, Liggett's, Dow's and Whelan's, the latter being known locally as Taylor Drug Company stores. There is also competition in the retail drug business between the so-called "chain" drug stores on the one hand, and the so-called "independent" drug stores (that are owned or operated either as individually-owned drug stores or as locally-owned chains) on the other hand. Accordingly the so-called independent or individually-owned drug stores have at-

tempted in every way to secure an advantage to themselves by advocating the enactment and enforcement of such legislation as the 1930 Kentucky "Gross Sales Tax Law" in order to handicap chain drug stores and other drug stores having a large volume of sales, with a heavy burden of taxation, from which all the so-called independent drug stores or locally-owned chains are practically exempt. In fact, fully 90 per cent of them will pay no tax under the law, and the remaining 10 per cent will pay but a very small tax.

To that end, the Secretary of the Kentucky Pharmaceutical Association has sent out to its members, who are widely scattered throughout the State and who include all [fol. 535] pharmacists and assistant pharmacists registered in Kentucky, and even to some druggists who are not members, the circular letter addressed under date January 16, 1931, "To the Druggists of the State of Kentucky," a signed copy of which letter is attached to the affidavit of James R. Karibo.

Noah A. Bash.

Subscribed and sworn to before me by N. A. Bash this 6th day of February, 1931. My commission expires March 4, 1934. Lilly R. Warren, Notary Public, Jefferson County, Kentucky.

[fol. 536] [Title omitted]

NARRATIVE OF TESTIMONY OF SHIRLEY E. HAAS GIVEN BEFORE CLARENCE E. WALKER ON THE TENTH DAY OF FEBRUARY, 1931

SHIRLEY E. HAAS testified as follows:

That he is a resident of Louisville, Kentucky, and is the Secretary of the Kentucky Food Distributor's Association, the Retail Grocers Association and the National Association of Retail Grocers.

That as Secretary of the Kentucky Food Distributor's Association he sent out about December the 6th, 1930, a bulletin to the grocery trade of the state of Kentucky, a copy of which bulletin was introduced in evidence as Exhibit 1, and which bulletin reads as follows:

"To the Grocery Trade of the State of Kentucky:

The retail sales tax law (anti-chain store bill) is being contested in the courts. If the courts decide against us it will be a victory for the chains and will cost you plenty. Read this letter and act quickly.

At the last session of the Kentucky Legislature that august body passed a retail sales tax law. That law is effective now and Kentucky merchants are compelled to file a schedule during January of 1931 indicating their sales for 1930.

This new law subjects you to the payment of a sales tax as follows:

[fol. 537] 1/20 of 1% on the first $400,000 of sales.
2/20 of 1% on the next 100,000 of sales.
5/20 of 1% on the next 100,000 of sales.
8/20 of 1% on the next 100,000 of sales.
11/20 of 1% on the next 100,000 of sales.
14/20 of 1% on the next 100,000 of sales.
17/20 of 1% on the next 100,000 of sales.
1% on all sales over $1,000,000.

This law, as originally planned was to be a straight 1% on all sales. The Kentucky Food Distributors Association insisted on the sliding scale indicated above. In addition, the Association was successful in writing into the bill a paragraph to the effect that all special state licenses could be credited against the sales tax.

For instance: If you pay $10.00 to handle oleomargarine; $10.00 to handle tobacco and $10.00 to handle soft drinks, this $30.00, or any part thereof, may be deducted from the amount of tax you may be subject to under the new law.

To illustrate: If your sales are $60,000 annually, your sales tax, according to the above schedule at 1/20 of 1%, would be $30.00. If you paid the three special licenses referred to heretofore, you will be given a credit of $30.00, consequently you will file a return showing your sales and by taking advantage of your credits the account will balance and you will pay nothing under the new law.

If the Association had not stepped in and insisted on a sliding schedule and credits for special licenses the tax would have been as follows:

1% of sales on a $60,000 business or $600.00 tax.

If your business amounts to $25,000 annually you would have been subject to a tax of $250.00. Using $25,000 as a basis of sales and with the schedule finally adopted of 1/20 of 1% your tax will be $12.50, subject of course to the deduction of any special licenses you might pay.

Now here is the crux of the situation and the reason that this letter is being sent you.

Any one knows that the State egislature has a perfect right to instigate any legislation to take care of the state government expenses. One half of the amount derived from this tax is to go to the Penal and Charities Board for the upkeep and extension of our penal and charities institutions. The other half of the money derived under the law will go to retire the state debt.

This law is to be contested in the courts of the State of Kentucky and will unquestionably be carried to the Supreme Court of the United States. Those who are seeking to prove that the law is unconstitutional are taking it into the courts on the grounds that the sliding scale is discriminatory and thereby violates both the State and Federal Constitutions.

[fol. 538] It is up to this Association to prove in the Courts that the sliding scale is not discriminatory and does not conflict with either the State or Federal Constitution.

In order to do this we must have funds to carry the case into the courts. Suit is being filed now in the Franklin Circuit Court testing the constitutionality of the sliding scale end of this law. If the grocery trade does not supply legal talent to defend the sliding scale, the measure will have no champion. Consequently our opponents (chain stores) will use the best legal talent money can buy to set the law aside.

Each merchant in the state of Kentucky must subscribe $2.00 in order that the Association may engage the proper legal talent and thereby insure the independent merchants of this commonwealth appropriate representation in presenting its argument that the sliding scale is constitutional and should be upheld.

If this sliding scale is thrown out there is no doubt but what a flat 1% sales tax law will be enacted and then the independents will be subject to the maximum tax instead of the minimum tax as is in evidence in the sliding scale.

Firms having two or more stores must couple their sales

as one individual firm or institution. You can therefore readily see that chain institutions will be subject to the maximum tax while the independent will be subject to the minimum tax.

Our investigation has shown that very few independent retailers enjoy business in excess of $400,000. Our further investigation indicates that 92% enjoy a volume of less than $60,000, hence 92% of the independents will pay nothing under this new law and 8% will pay a very small tax. What a wallop the chains get by having to pay the maximum 1% under the sliding scale.

We know that one chain institution alone (and one in the grocery business by the way) will be subject to a tax under this new law in excess of $150,000.

The case is being taken into the courts this week and the emergency calls for immediate action. The Association has therefore made arrangements for proper legal talent to represent the grocers interests. Your share in this is $2.00. Send it now. Do not wait a day. It is either pay $2.00 now or many many times that amount later.

Action please!

Very truly yours, Shirley E. Haas, Secretary.

That the statements contained in the bulletin are true to the best of his knowledge; that few independent retailers enjoy business in excess of $400,000 and that 92% enjoy a volume of less than $60,000 and that for that reason [fol. 539] 92% of the independent retailers would pay nothing under the Gross Sales Law of Kentucky, and that the remaining 8% of the independents would pay a very small tax under the Act; that his figures apply particularly to the Grocery trade; that one grocery concern, viz: The Great Atlantic & Pacific Tea Company, would be subject to a tax in excess of $150,000 under the law.

That about 2% of the merchants in the grocery business do above a quarter million dollars worth of sales; that there is a breakdown at $249,999, and another from $250,000 to $499,999 and that the next breakdown is $500,000 to $1,000,000 and over $1,000,000; that there is no breakdown figure at $400,000; that he could not point out any independent retailer outside of multiple outlet stores and department stores that enjoyed a business in excess of $400,000 aside from Byck Brothers, in Louisville.

That about 800 or 1,000 bulletins similar to the one introduced in evidence were sent out to members of the Association; that upon request he attended the sessions of Kentucky Legislature at the time the Gross Sales Tax Law was passed, and that he attended one meeting of the Committee when the Bill was considered; that as a result he had personal knowledge of the statements made in the Bulletin with reference to the action of the Legislature.

That the sliding scale written into the Act was the one advocated by the Kentucky Food Distributors Association; that the Association suggested the paragraph in regard to crediting of special state licenses against the Sales Tax.

That the statement in the bulletin "suit is being filed in the Franklin Circuit Court attacking the constitutionality of the sliding scale and of this law" did not have reference [fol. 540] to any particular suit but that at the time the statement was made he knew that suit was going to be filed; that the Chairman of the Penal and Charities Board, Judge Haswell, personally informed him that the Board was attempting to make certain purchases of land and certain alterations and improvements in Penal institutions and that they wanted to ascertain the amount of money that they could expect from the law in order to lay out their plans.

That this information was given to him some time in October or November of 1931 and that Haas was of the opinion that his assistance was desired; that suit was eventually brought in the Franklin Circuit Court of Kentucky by a Mr. Moore against the State Board of Charities and Corrections of Kentucky; that Mr. Forrest Moore, the plaintiff, was a member of the Association of which Mr. Haas was Secretary, prior to and at the time the suit was instituted; that Mr. Haas never communicated with Mr. Moore about the suit; that Mr. Haas did not know whether Mr. Moore was present at the trial of the suit filed by him in Frankfort, and that Mr. Haas never communicated with Mr. Briggs, who was Mr. Moore's lawyer.

That the reference in the bulletin to suit being filed in the Franklin Circuit Court was not made in contemplation of the Moore suit, but was made with regard to a similar one on behalf of another man who had been picked out to file the suit; that Mr. Haas was informed through Leslie Morris, who represented the penal and Charities Board, that they would pick out someone as plaintiff to bring an action to

test the law; that he mailed out a bulletin on December 27, 1930, which was addressed to the Grocery Manufacturers and Wholesalers in the State of Kentucky, which bulletin was introduced in evidence and reads as follows:

[fol. 541] "To Grocery Manufacturers and Wholesalers in the State of Kentucky:

On December 9th we wrote you stating that a test suit had been filed in the Franklin Circuit Court to test the legality of House Bill No. 111, more appropriately termed "the 1930 retail sales tax law."

Since that time you doubtlessly have read in the press, confirmation of the above statement. You may think you are not interested in the outcome of this case, due to the fact that the law specifically states that the sales tax is to be levied only on retailers.

While our state law makers were considering this sales tax measure, a Committee from this Association worked with them in an attempt to create a measure that would be of the most value to independents w-ere engaged in manufacturing, wholesaling or retailing.

One of the hardest battles, fought and won by this Committee, was to have our State law makers insert in the measure the word "retail". We fought over this one word from ten o'clock one evening until five o'clock the next morning before we could convince our State Representatives and Senators that a straight sales tax on all branches of business would be unsound.

Here is another copy of the bulletin we enclosed with your letter of December 9th which is written primarily to appeal to retail distributors. It sets forth the final bill enacted by the 1930 General Assembly.

House Bill No. 111 was the only tax measure passed by the 1930 Assembly. The State must have money to retire its public debt and to take care of the overcrowded condition in the State Penal and Charitable institutions. If this law fails to run the gauntlet of the courts, a special session of the Legislature will unquestionably be called and just what new measure will be passed we will leave to your imagination.

We have evidence from the best legal authorities in the United States that the law as it is written is constitutional,

but we will have to supply the necessary legal talent to prove it. Won't you therefore not only send us your check for the $10.00 that we asked you for in our last letter, but get your sales force to work collecting $2.00 from the retailers as outlined in the enclosed bulletin?

A few wholesalers and manufacturers in Kentucky have responded gloriously and we thank them from the bottom of our heart, but not enough to take care of the task at hand. If you want to save yourself an abundance of grief in the future, send $10.00 now and get your sales force busy collecting $2.00 from each retailer.

For your own protection, act at once.

Very truly yours, Shirley E. Haas, Secretary."

[fol. 542] and that he sent out bulletin dated December 9, 1930, to the Wholesale trade, which bulletin was introduced in evidence, marked Exhibit 3, and reads as follows:

December 9, 1930.

"To the Wholesale Trade:

A test suit has been filed in Franklin Circuit Court to test the legality of House Bill No. 111, which, as you know, is the so-called Anti-Chain Store Tax Bill, passed at the last session of the Kentucky Legislature.

Independent wholesale and retail grocers have been called on to meet the emergency and supply legal counsel for the defense of this measure. The chain stores will use every measure at their command to have the bill declared unconstitutional. If we are not represented by competent legal counsel, there is a likely possibility of the chains finding some flaw that will reduce the law to a flat rate of 1% tax on all sales, whereas the present status of the bill protects independent retail grocers on a graduated scale of low rates.

The necessity for quick action on the part of the Kentucky Food Distributors Association in securing legal counsel made it impossible to consult all interested parties before obligating ourselves for the cost of defending this case through the courts. Those of us in position to know the importance of having legal representation felt safe in authorizing the Kentucky Food Distributors Association to employ legal counsel, and pro rate the cost among wholesale and retail grocers.

An assessment of ten dollars against each wholesale grocer, and two dollars against retail grocers will be ample to carry the case through the courts. Of course, all who realize the importance of winning this case will be more than glad to contribute the small per capita sum needed to supply legal counsel. However, the real problem is getting the message to the retail grocer, and collecting the two dollars. This obligation must fall on wholesale grocers, who are doubtless in better position to make the collections, through their salesmen, than any one else.

The enclosed bulletin, treating the case from the retailers point of view, explains the whole proposition in detail. Please read carefully, and arrange to get your salesmen at work with retail grocers as soon as possible. Just a few days of well directed effort on the part of your salesmen will clear up our financial needs, and protect independent wholesale and retail merchants against the likelihood of tremendous losses which might be the result of our failure to defend the measure.

More of the enclosed bulletins will be supplied you if desired for your salesmen to use in presenting the case to the retail trade.

[fol. 543] We must get our money together not later than December 20. Please mail your check for ten dollars at once, and get your salesmen to work with the least possible delay. It would be nothing short of a calamity to individual merchants if we fail to meet this emergency, and the cost would be many times more than our present investment should we fail to keep House Bill No. 111 a law.

Yours respectfully, Shirley E. Haas, Secretary."

That he sent out bulletin dated January 24, 1931, addressed to the Wholesale Grocery Trade of the State of Kentucky; which bulletin was introduced and marked Exhibit 4 and reads as follows:

"To the Wholesale Grocery Trade of the State of Kentucky:

Some of the wholesalers in the State of Kentucky have received retail sales tax blanks from the State Tax Commissioner at Frankfort with instructions from the Commission that wholesalers must pay a retail sales tax on all

sales made by them at retail. The instructions seem to imply that merchandise sold to restaurants, hotels, and institutions constitute a retail sale. This is not the case, according to a statement made to this office January 23rd, 1931, by Commissioner Glenn.

If you sell hotels, restaurants or institutions in wholesale quantities and at wholesale prices you are not subject to tax under the retail sales tax law. Therefore, you should not file a return with the Tax Commission, unless you actually carry on retail business.

This information is being passed on to you in order that you may thoroughly understand that the sales tax law passed by the last session of the Kentucky Legislature is purely a tax on retail sales only.

Respectfully yours, Shirley E. Haas, Secretary.

P. S.—Have you solicited your retail customers for $2.00 each as a subscription to the fund being created to furnish legal talent to our state authorities to prove the retail sales tax law constitutional? Assistance please!

S. E. H."

That to the best of his knowledge these were all the bulletins sent out to members of the Association relative to [fol. 544] the Cross Sales law.

It is agreed by and between counsel for plaintiff and counsel for the defendant that the foregoing is a correct narrative statement of the testimony contained in the deposition of Shirley E. Haas taken before Clarence E. Walker, a Notary Public, on February 10, 1931, in Louisville, Kentucky, and introduced in evidence in the above entitled case, and it is further agreed that this narrative form may be used as part of the record in the appeal to the Supreme Court of the United States as a substitute for the deposition introduced before the three-judge court.

——— ———, Counsel for Plaintiff. S. H. Brown, Counsel for Defendant.

[fol. 545] AFFIDAVIT OF HENRY F. WALRADT

STATE OF KENTUCKY,
County of Jefferson, ss:

Affidavit of Henry F. Walradt in Opposition to Plaintiff's Motion for Interlocutory Decree

HENRY F. WALRADT, first being duly sworn, says:

I am, and have for the past twenty years been, a resident of Columbus, Ohio. I am now serving in the Ohio State University as Professor of Economics, and have been connected with that institution for the past twenty years.

Immediately preceding that, I had been engaged as a student for eight years in Yale University, first as an undergraduate and then as a graduate student, taking there three degrees: B. A., M. A., and Ph. D. During the last half of 1916 and part of 1917, I was engaged in a taxation study for the Connecticut Chamber of Commerce. From September, 1918, to September, 1919, I was a member of the Research Bureau of the Federal War Trade Board and served as historian. For the last seven or eight years, I have taken an active part in shaping the tax legislation in the State of Ohio, sitting in practically all of the taxation committees of the Sessions of the General Assembly. I have also served as an advisor for the Ohio Council of Retail Merchants. I am a member of the American Economic Association, American Society of University Professors, and of the National Tax Association. As a mem-
[fol. 546] ber of the National Tax Association, I served last year on the Committee of Motor Vehicle Taxation under the chairmanship of Professor Martin, and I am again serving with this committee for the current year.

While a graduate student in the general field of economics, I specialized in the field of public finance and my thesis was written in that field, and as professor in Ohio State University, I am teaching subjects in the field of public finance.

I have been engaged for several weeks in collecting material to be used in Court in connection with the above-styled case. I have prepared certain charts and tables filed herein. These charts and tables are marked, for identifi-

cation, Walradt, Exhibit A; Walradt, Exhibit B; Walradt, Exhibit C; Walradt, Exhibit D; Walradt, Exhibit E; Walradt, Exhibit F; Walradt, Exhibit G; Walradt, Exhibit H; Walradt, Exhibit I; and Walradt, Exhibit J. These were prepared by me and are referred to hereinafter by their respective identifying numbers.

It has been my purpose to study the Kentucky Gross Sales Tax with the view of finding whether or not it is unduly discriminatory and confiscatory. Are the rates too sharply progressive, and have there been other taxes which have been as heavy and as sharply progressive?

It is my contention that the Kentucky Gross Sales Tax (Chapter 149, Acts of 1930, pages 475-482) is a tax measure which will provide some much-needed revenue for the State [fol. 547] of Kentucky, and that the classification provided in the Act is not unreasonable, but is based on the ability to pay.

The tax is levied upon the gross sales or gross receipts of retail merchants. Gross earnings or gross receipts have long been used by various taxing units in this country as a measure for levying taxes, and taxes upon gross earnings or gross receipts have been upheld by the courts. At the present time the neighboring State of Ohio imposes the following taxes based upon gross earnings:

Steam railroads	4%
Pipe line companies	4%
Express companies	2%
Telegraph	2%
Electric light and power	1.35%
Gas	1.35%
Heating and cooling companies	1.35%
Messenger and signal companies	1.35%
Union depot companies	1.35%
Water transportation	1.35%
Waterworks	1.35%
Sleeping and freight line, or equipment companies	1.35%
Electric railroads	1.2 %

California imposes a 7½% tax on the gross earnings of gas and electric companies and a 7% tax on the gross earnings of railroads. Note that the rates in all these cases exceed the highest rate imposed by the Kentucky Act. In this connection it might be noted that the French have

a 2% sales tax which applies to the sales of retail merchants as well as to other sales. This is in support of the [fol. 548] contention that the highest rate of the Kentucky Gross Sales Tax is not unduly high.

The State of Maine has taxed railroads on their gross receipts since 1881. It is interesting to note that from that date on Maine has used progressive rates. The Act of 1881 imposed a tax of ¼ of 1% of the gross receipts of such railroads whose average gross receipts per mile did not exceed $2,250 and this rate was increased by ¼ of 1% for each additional $750 or fraction thereof on the average gross receipts per mile until the maximum rate of 3¼% of the entire gross receipts was reached in the case of railroads where average gross receipts per mile exceeded $11,250. In this case the maximum rate was thirteen times the lowest rate.

In 1907, Maine increased their progressive rates so that the lowest rate was ½ of 1% of the gross receipts of those railroads whose average gross receipts per mile did not exceed $1,500 and increased this rate by ¼ of 1% for each additional $400 or fraction thereof in the average gross receipts per mile until the maximum rate of 5½% of the total gross receipts was reached for those railroads whose average gross receipts per mile exceeded $9,500.

The present method of taxing the gross receipts of railroads used by Maine was adopted in 1927, and is as follows:

[fol. 549]

	Tax
When net receipts do not exceed 10% of gross receipts	3½% of gross receipts
When net receipts constitute from 10% to 15% of gross receipts	4 % " " "
When net receipts constitute from 15% to 20% of gross receipts	4½% " " "
When net receipts constitute from 20% to 25% of gross receipts	5 % " " "
When net receipts constitute over 25% of gross receipts	5½% " " "

From this table it appears that any railroad whose net earnings were less than 3½% of its gross earnings would be taxed for more than 100% of its net earnings. The fact

that a railroad is operating at an actual loss does not excuse it from paying a tax measured by its gross earnings.

Maine also uses progressive rates in taxing the gross receipts of telegraph and telephone companies (the rates ranging from 1¼ to 6 per cent) and of street railways (the rates ranging from 1¼ to 4 per cent).

The use of progressive rates in connection with a gross sales tax is reasonable since in general the larger the gross sales, the greater will be the net income of the concern making the sales. Ability to pay is measured by the absolute amount of net income received. It matters not from what source the income is received or how large a return is received on the capital invested. An individual or concern receiving a certain amount of net income has by that fact a certain ability to pay taxes and it is now generally agreed [fol. 550] that as one's net income increases, his ability to pay taxes increases progressively. It is in accordance with this theory that Wisconsin, since 1911, has levied progressive net income taxes upon both individuals and corporations. If it is true that as the amount of gross sales increases the amount of net income resulting increases, then the use of progressive rates in a gross sales tax is justifiable and reasonable.

The tendency for net income to increase as gross sales increase is sufficient by itself to support the constitutionality of a graduated tax on gross sales, but, if in addition, it can be shown—as some of the other witnesses will endeavor to prove—that there is also a tendency for the actual return on the investment to increase as well as the amount of net income to increase with increased volume of sales, the case for progressive taxes is made still stronger.

There is still another strong argument in favor of progressive rates in connection with a gross sales tax. In those states which depend largely for their local revenues upon the general property tax, it is a well known fact that those concerns which have a large volume of sales with a rapid turnover escape bearing their fair share of the tax burden as compared with those concerns having a much smaller volume of sales and a slow turnover. The average amount of merchandise on hand at any time as compared with the total business done is relatively much smaller for the former than the latter. It is only fair, therefore, that [fol. 551] in addition to the general property tax some other

form of tax be devised which will tend to equalize the tax burden between these two groups. In so far as a gross sales tax tends to be larger for concerns having a relatively rapid turnover, such a tax served that purpose.

A comparison of the Kentucky Gross Sales Tax with the Federal Income Tax on the incomes of 1918 throws considerable light upon the question of whether or not the rates of the Kentucky tax are excessive.

Two graphs (Exhibits A and B) are presented showing the rate of increase in the effective rates of the Kentucky Gross Sales Tax as compared with the effective rates of the Federal Income Tax based on incomes of 1918. Let us make clear what is meant by the term "effective rates." In the case of both taxes the rates increase as the amount of the base—i. e., gross sales or net income—increases; but note that the increased rates do not in either case apply to the total base, but only to a certain portion in excess of a given sum up to some larger sum. It is, therefore, necessary to compute the taxes on each of these several portions and then add them in order to ascertain the total tax due. To find the "effective rate" of tax on a given amount of gross sales or net income, it is necessary to divide the total tax due by said amount. This gives the rate of tax which if applied to the total gross sales or net income would give the tax due. This is known as the "effective rate." A table [fol. 552] has been prepared (Exhibit C) which shows how the Kentucky Gross Sales Tax is computed and the effective rates of the tax from $400,000 of gross sales up to $12,000,000 of gross sales.

It is important that the effective rate be constantly kept in mind whenever progressive rates are used, the increased rates applying only to portions of the total sum taxed. It is a natural tendency to think only in the terms of the highest rate applicable, whereas the actual effective rate may be considerably lower. For example, retail merchants who have gross sales in Kentucky of over $1,000,000 are likely to think of the tax on gross sales as a 1% tax. By examining Exhibit C, it is clear that the tax does not reach even ½ of 1% until gross sales amount to $1,390,000, and the tax does not reach ¾ of 1% until the gross sales amount to nearly $2,800,000. In fact, after allowing for the credits permitted by the Act in question, it is improbable that any retail merchant in Kentucky will pay a tax of more than

82/100 of 1% of his gross sales. In no case will it be possible for the tax to reach a full 1%. Notice that the changes in the effective rate of the tax as the gross sales increase by $100,000 are small, the largest increase being only 632/10,000 of 1% in the case of the increase in gross sales from $1,000,000 to $1,100,000. Notice also the flattening out of the increases after $2,500,000 gross sales. This is shown not only in Exhibit C, but in the graph (Exhibit D) which shows the changes in the effective rates of the Kentucky [fol. 553] Gross Sales Tax. The same fact is brought out in Exhibits E, F, and G under the column entitled "Ratio between successive effective rates—Gross Sales."

Exhibit A plots the effective rates of the Kentucky Sales Tax as computed in Exhibit C, in such a way as to show the degree of progression. The steeper the curve the larger the degree of progression. In Exhibit B the rapidity of the progression in the effective rates of the Federal Income Tax levied on 1918 incomes is plotted. By comparing the two graphs which are drawn on the same scale, it will be readily seen that the degree of progression is greater for the Federal Income Tax for the first $500,000. The real comparison between these two taxes should not be made for the same amount of gross sales and net income, but rather for that amount of net income which might be expected to result from a given amount of gross sales. Such a comparison of resulting taxes and effective rates is made in Exhibits E, F, and G, in which the assumption is made that the net receipts amount to 4, 3, and 2% respectively of the gross sales. These tables show also the degree of progression in the effective rates and the degree of progression in the amount of taxes due for stated amounts of gross sales and the equivalent net incomes.

It will be noted that the increase in the effective rates and in the tax as computed is greater for the Federal Income Tax at first, but that in Exhibits E and F the effective [fol. 554] rates and the tax as computed increase at a faster rate in the case of the Gross Sales Tax from $500,000 gross sales until $1,800,000 gross sales in Exhibit E and $1,900,000 in Exhibit F. In Exhibit G the effective rates and the tax as computed increase at a faster rate from $600,000 gross sales until $2,000,000 gross sales. Note, however, that in all three cases from this point on the effective rates and the increase in the tax as computed progress at a higher rate in

the case of the Federal Income Tax than in the case of the Kentucky Gross Sales Tax.

In Exhibit E the actual increase in the tax as computed for each bracket is always larger for the Federal Income Tax; in Exhibit F it is always larger from $1,600,000 gross sales, and in Exhibit E it is always larger for the Federal Income Tax from $4,000,000 gross sales on.

Finally, it should be noted that if the net income amounts to 4% or only 3% of the gross sales, the actual amount of taxes payable under the Federal Income Tax levied on 1918 incomes was always larger than the taxes payable under the Kentucky Gross Sales Tax for the equivalent amount of gross sales. Even if we assume that the average net income made by retail merchants is only 2% of their gross sales, the taxes payable under the aforesaid Federal Income Tax were larger than the taxes payable on the equivalent amount of gross sales under the Kentucky Gross Sales Tax until the gross sales exceed $900,000 and the amount of taxes due [fol. 555] under the Federal Income Tax again exceed those due under the Kentucky Gross Sales Tax when the gross sales approach $8,000,000. Thus, even assuming net income amounts to only 2% of gross sales, any individual merchant or partnership doing $8,000,000 or more of business would have been more heavily taxed under this Federal Income Tax than under the Kentucky Gross Sales Tax. If the percentage of net income to gross sales is 3% or more, as shown above, the taxes payable under this Federal Income Tax would always be higher. Exhibits H, I, and J show graphically the relation between the amounts of taxes due under the two types of taxes being compared in Exhibits E, F, and G.

Summary: The fact that not only have proportional taxes on gross receipts or earnings been levied for years by various taxing divisions in this country, but also graduated taxes on such gross receipts or earnings and that these taxes have been upheld by the courts; the fact that as gross sales increase the tendency is for net income to increase giving to the recipient greater ability to pay taxes and the fact that the Federal Income Tax levied upon the incomes of 1918, although in general increasing at a more rapid rate and resulting in heavier taxes than is true for the Kentucky Gross Sales Tax, was not thrown out by the courts as unduly discriminatory or confiscatory, lead to the conclusion

that the Kentucky Sales Tax is not unduly discriminatory or confiscatory.

Henry F. Walradt.

[fol. 556] STATE OF KENTUCKY,
County of Jefferson, Sct.:

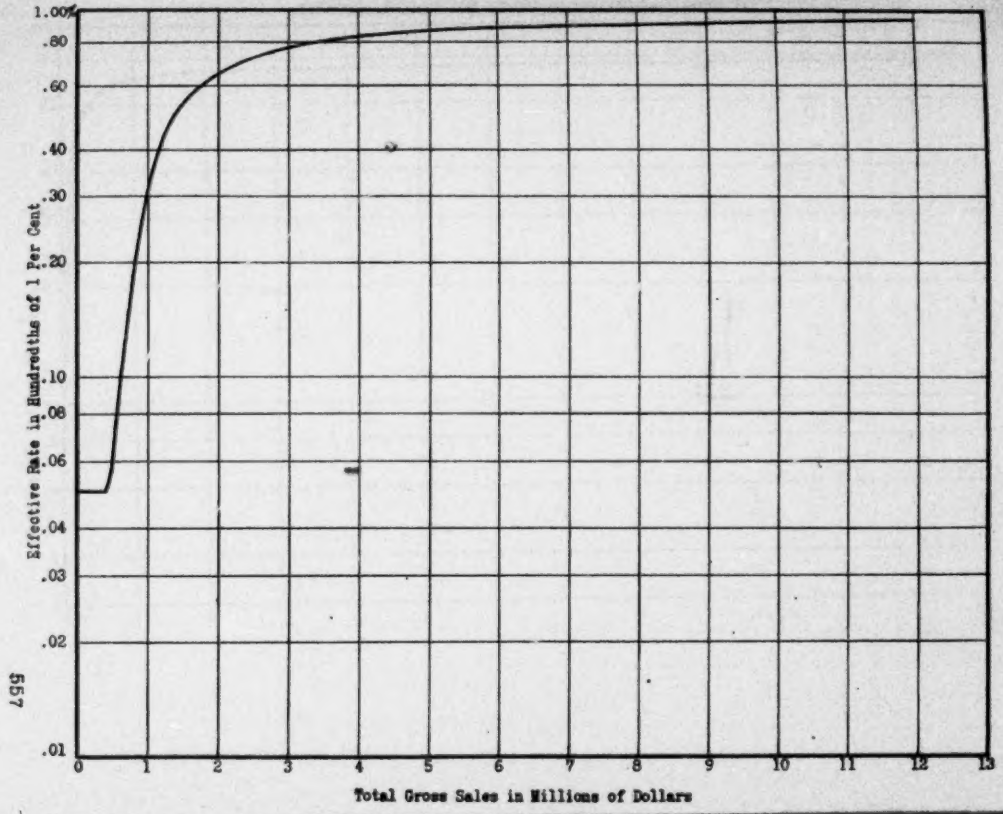
On this the 12 day of February, 1931, personally appeared before me, Henry F. Walradt, who signed the foregoing affidavit in my presence and made oath to the truth of the statements therein contained.

J. Whitcomb Welch, Notary Public, Jefferson Co., Ky. My Commission expires on the 8 day of Feby., 1934.

(Here follow Exhibits A and B to affidavit of Henry F. Walradt, side folios 557 and 558)

WALRADT—EXHIBIT A.

EFFECTIVE RATE ON TOTAL GROSS SALES OF THE KENTUCKY GROSS SALES TAX

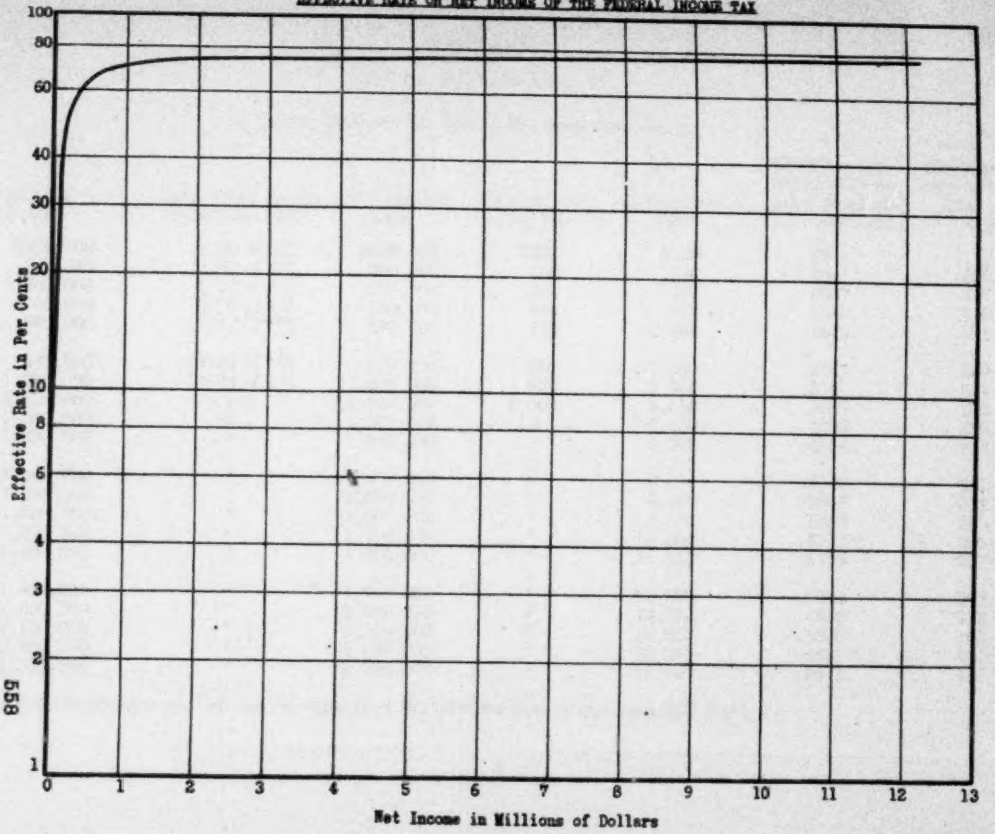


557

312A

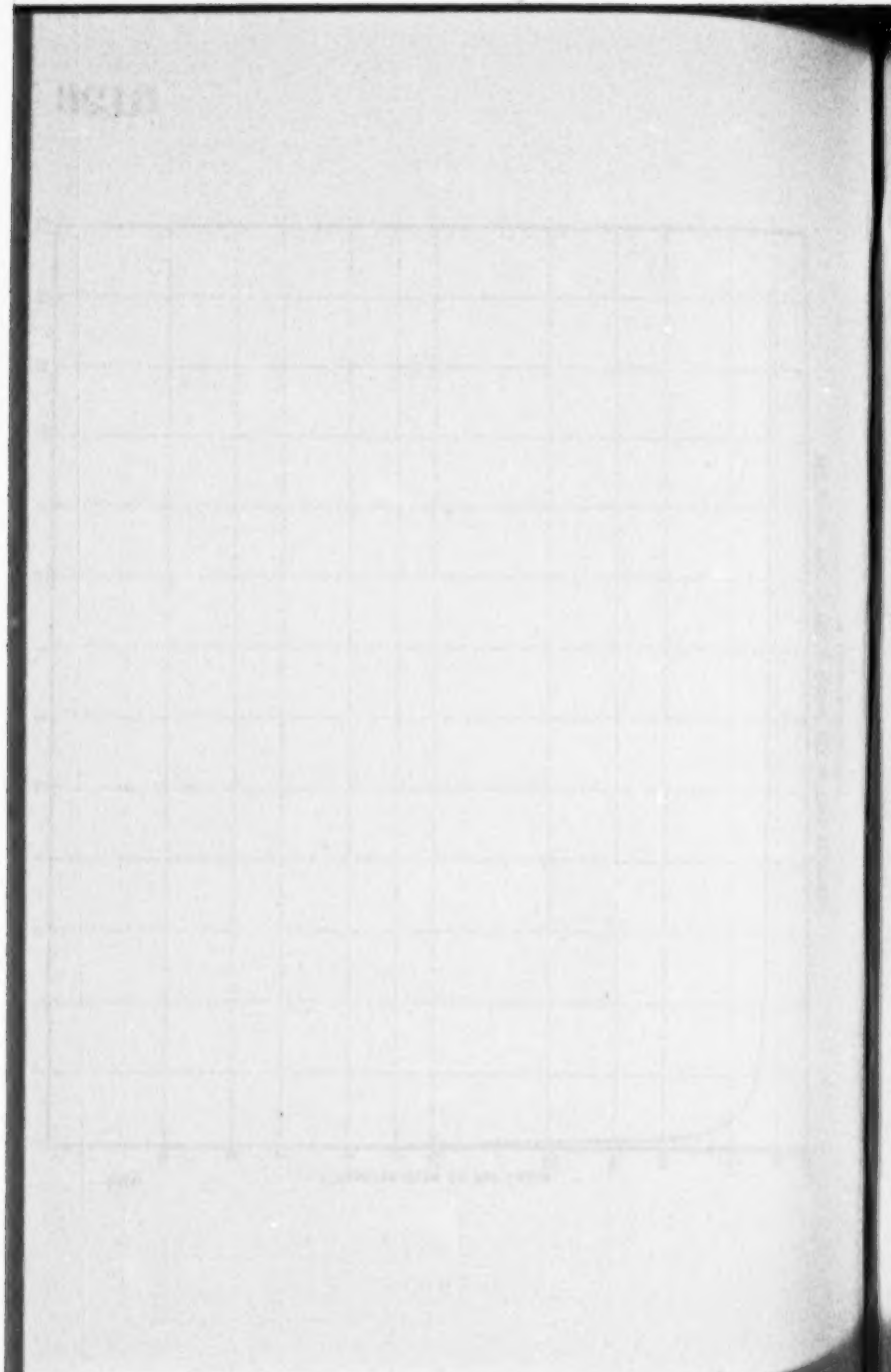
WALRADT—EXHIBIT 8.

EFFECTIVE RATE ON NET INCOME OF THE FEDERAL INCOME TAX



559

3128



[fol. 559]

[fol. 560]

Appendix

DR. WALRADT—EXHIBIT C

Application of the Kentucky Sales Tax Rates

Fractional parts of gross sales		Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class (fraction of 1 per cent)
$1—	$400,000.....	1/20 of 1%	$400,000	$200	$200	.05	.....
400,000—	500,000.....	2/20 of 1%	500,000	100	300	.06	100/10,000
500,000—	600,000.....	5/20 of 1%	600,000	250	550	.0917	317/10,000
600,000—	700,000.....	8/20 of 1%	700,000	400	950	.1357	440/10,000
700,000—	800,000.....	11/20 of 1%	800,000	550	1,500	.1875	518/10,000
800,000—	900,000.....	14/20 of 1%	900,000	700	2,200	.2444	569/10,000
900,000—	1,000,000.....	17/20 of 1%	1,000,000	850	3,050	.305	611/10,000
1,000,000—	1,100,000.....	1%	1,100,000	1,000	4,050	.3682	632/10,000*
1,100,000—	1,200,000.....	Do.	1,200,000	Do.	5,050	.4208	526/10,000
1,200,000—	1,300,000.....	"	1,300,000	"	6,050	.4654	446/10,000
1,300,000—	1,400,000.....	"	1,400,000	"	7,050	.5036	382/10,000
1,400,000—	1,500,000.....	"	1,500,000	"	8,050	.5367	331/10,000
1,500,000—	1,600,000.....	"	1,600,000	"	9,050	.5656	289/10,000
1,600,000—	1,700,000.....	"	1,700,000	"	10,050	.5912	256/10,000
1,700,000—	1,800,000.....	"	1,800,000	"	11,050	.6139	227/10,000
1,800,000—	1,900,000.....	"	1,900,000	"	12,050	.6342	203/10,000
1,900,000—	2,000,000.....	"	2,000,000	"	13,050	.6525	183/10,000
2,000,000—	2,100,000.....	"	2,100,000	"	14,050	.6690	165/10,000
2,100,000—	2,200,000.....	"	2,200,000	"	15,050	.6841	151/10,000
2,200,000—	2,300,000.....	"	2,300,000	"	16,050	.6978	137/10,000

* Largest increase in the effective rate of any one class over the effective rate of the preceding class.

[fol. 561] DR. WALRADT—EXHIBIT C—CONTINUED

Fractional parts of gross sales		Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class (fraction of 1 per cent)
$2,300,000—	2,400,000.....	1%	$2,400,000	$1,000	$17,050	.7104	126/10,000
2,400,000—	2,500,000.....	Do.	2,500,000	Do.	18,050	.722	116/10,000
2,500,000—	2,600,000.....	"	2,600,000	"	19,050	.7327	107/10,000
2,600,000—	2,700,000.....	"	2,700,000	"	20,050	.7426	99/10,000
2,700,000—	2,800,000.....	"	2,800,000	"	21,050	.7518	92/10,000
2,800,000—	2,900,000.....	"	2,900,000	"	22,050	.7603	85/10,000
2,900,000—	3,000,000.....	"	3,000,000	"	23,050	.7683	80/10,000
3,000,000—	3,100,000.....	"	3,100,000	"	24,050	.7758	75/10,000
3,100,000—	3,200,000.....	"	3,200,000	"	25,050	.7828	70,10,000
3,200,000—	3,300,000.....	"	3,300,000	"	26,050	.7894	66/10,000
3,300,000—	3,400,000.....	"	3,400,000	"	27,050	.7956	62/10,000
3,400,000—	3,500,000.....	"	3,500,000	"	28,050	.8014	58/10,000
3,500,000—	3,600,000.....	"	3,600,000	"	29,050	.8069	55/10,000
3,600,000—	3,700,000.....	"	3,700,000	"	30,050	.8122	53/10,000
3,700,000—	3,800,000.....	"	3,800,000	"	31,050	.8171	49/10,000
3,800,000—	3,900,000.....	"	3,900,000	"	32,050	.8218	47/10,000
3,900,000—	4,000,000.....	"	4,000,000	"	33,050	.8263	45/10,000
4,000,000—	4,100,000.....	"	4,100,000	"	34,050	.8305	42/10,000
4,100,000—	4,200,000.....	"	4,200,000	"	35,050	.8345	40/10,000
4,200,000—	4,300,000.....	"	4,300,000	"	36,050	.8384	39/10,000
4,300,000—	4,400,000.....	"	4,400,000	"	37,050	.8420	36/10,000
4,400,000—	4,500,000.....	"	4,500,000	"	38,050	.8456	36/10,000
4,500,000—	4,600,000.....	"	4,600,000	"	39,050	.8489	33/10,000
4,600,000—	4,700,000.....	"	4,700,000	"	40,050	.8521	32/10,000
4,700,000—	4,800,000.....	"	4,800,000	"	41,050	.8552	31/10,000
4,800,000—	4,900,000.....	"	4,900,000	"	42,050	.8582	30/10,000
4,900,000—	5,000,000.....	"	5,000,000	"	43,050	.861	28/10,000

5,000,000—	5,100,000.....	"	5,100,000	"	44,050	.8637	27/10,000
5,100,000—	5,200,000.....	"	5,200,000	"	45,050	.8663	26/10,000
5,200,000—	5,300,000.....	"	5,300,000	"	46,050	.8689	26/10,000
[fol. 562]							
5,300,000—	$5,400,000.....	"	5,400,000	"	47,050	.8713	24/10,000
5,400,000—	5,500,000.....	"	5,500,000	"	48,050	.8736	23/10,000
5,500,000—	5,600,000.....	"	5,600,000	"	49,050	.8759	23/10,000
5,600,000—	5,700,000.....	"	5,700,000	"	50,050	.8781	22/10,000
5,700,000—	5,800,000.....	"	5,800,000	"	51,050	.8802	21/10,000
5,800,000—	5,900,000.....	"	5,900,000	"	52,050	.8822	20/10,000
5,900,000—	6,000,000.....	"	6,000,000	"	53,050	.8842	20/10,000
6,000,000—	6,100,000.....	"	6,100,000	"	54,050	.8861	19/10,000
6,100,000—	6,200,000.....	"	6,200,000	"	55,050	.8879	18/10,000
6,200,000—	6,300,000.....	"	6,300,000	"	56,060	.8897	18/10,000
6,300,000—	6,400,000.....	"	6,400,000	"	57,050	.8914	17/10,000
6,400,000—	6,500,000.....	"	6,500,000	"	58,050	.8931	17/10,000
6,500,000—	6,600,000.....	"	6,600,000	"	59,050	.8947	16/10,000
6,600,000—	6,700,000.....	"	6,700,000	"	60,050	.8963	16/10,000
6,700,000—	6,800,000.....	"	6,800,000	"	61,050	.8978	15/10,000
6,800,000—	6,900,000.....	"	6,900,000	"	62,050	.8993	15/10,000
6,900,000—	7,000,000.....	"	7,000,000	"	63,050	.9007	14/10,000
7,000,000—	7,100,000.....	"	7,100,000	"	64,050	.9021	14/10,000
7,100,000—	7,200,000.....	"	7,200,000	"	65,050	.9035	14/10,000
7,200,000—	7,300,000.....	"	7,300,000	"	66,050	.9048	13/10,000
7,300,000—	7,400,000.....	"	7,400,000	"	67,050	.90608	13/10,000
7,400,000—	7,500,000.....	"	7,500,000	"	68,050	.90733	13/10,000
7,500,000—	7,600,000.....	"	7,600,000	"	69,050	.90855	12/10,000
7,600,000—	7,700,000.....	"	7,700,000	"	70,050	.9097	12/10,000
7,700,000—	7,800,000.....	"	7,800,000	"	71,050	.9109	12/10,000
[fol. 563]							
7,800,000—	7,900,000.....	"	7,900,000	"	72,050	.9120	11/10,000
7,900,000—	8,000,000.....	"	8,000,000	"	73,050	.9131	11/10,000

DR. WALRADT—EXHIBIT C—CONTINUED

Fractional parts of gross sales	Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class (fraction of 1 per cent)
$8,000,000— 8,100,000.....	1%	$8,100,000	$1,000	$74,050	.9142	11/10,000
8,100,000— 8,200,000.....	Do.	8,200,000	Do.	75,050	.91524	10/10,000
8,200,000— 8,300,000.....	"	8,300,000	"	76,050	.91627	10/10,000
8,300,000— 8,400,000.....	"	8,400,000	"	77,050	.91726	10/10,000
8,400,000— 8,500,000.....	"	8,500,000	"	78,050	.91823	10/10,000
8,500,000— 8,600,000.....	"	8,600,000	"	79,050	.9192	10/10,000
8,600,000— 8,700,000.....	"	8,700,000	"	80,050	.9201	9/10,000
8,700,000— 8,800,000.....	"	8,800,000	"	81,050	.9210	9/10,000
8,800,000— 8,900,000.....	"	8,900,000	"	82,050	.9219	9/10,000
8,900,000— 9,000,000.....	"	9,000,000	"	83,050	.92278	9/10,000
9,000,000— 9,100,000.....	"	9,100,000	"	84,050	.92363	9/10,000
9,100,000— 9,200,000.....	"	9,200,000	"	85,050	.92446	8/10,000
9,200,000— 9,300,000.....	"	9,300,000	"	86,050	.92527	8/10,000
9,300,000— 9,400,000.....	"	9,400,000	"	87,050	.92606	8/10,000
9,400,000— 9,500,000.....	"	9,500,000	"	88,050	.92684	8/10,000
9,500,000— 9,600,000.....	"	9,600,000	"	89,050	.92760	8/10,000
9,600,000— 9,700,000.....	"	9,700,000	"	90,050	.92835	8/10,000
9,700,000— 9,800,000.....	"	9,800,000	"	91,050	.92908	7/10,000
9,800,000— 9,900,000.....	"	9,900,000	"	92,050	.92980	7/10,000
9,900,000— 10,000,000.....	"	10,000,000	"	93,050	.9305	7/10,000
10,000,000— 10,100,000.....	"	10,100,000	"	94,050	.93119	7/10,000
10,100,000— 10,200,000.....	"	10,200,000	"	95,050	.93186	7/10,000
10,200,000— 10,300,000.....	"	10,300,000	"	96,050	.93252	7/10,000
10,300,000— 10,400,000.....	"	10,400,000	"	97,050	.93317	7/10,000
10,400,000— 10,500,000.....	"	10,500,000	"	98,050	.93381	6/10,000

10,500,000— 10,600,000.....	"	10,600,000	"	99,050	.93443	6/10,000
10,600,000— 10,700,000.....	"	10,700,000	"	100,050	.93505	6/10,000
10,700,000— 10,800,000.....	"	10,800,000	"	101,050	.93565	6/10,000

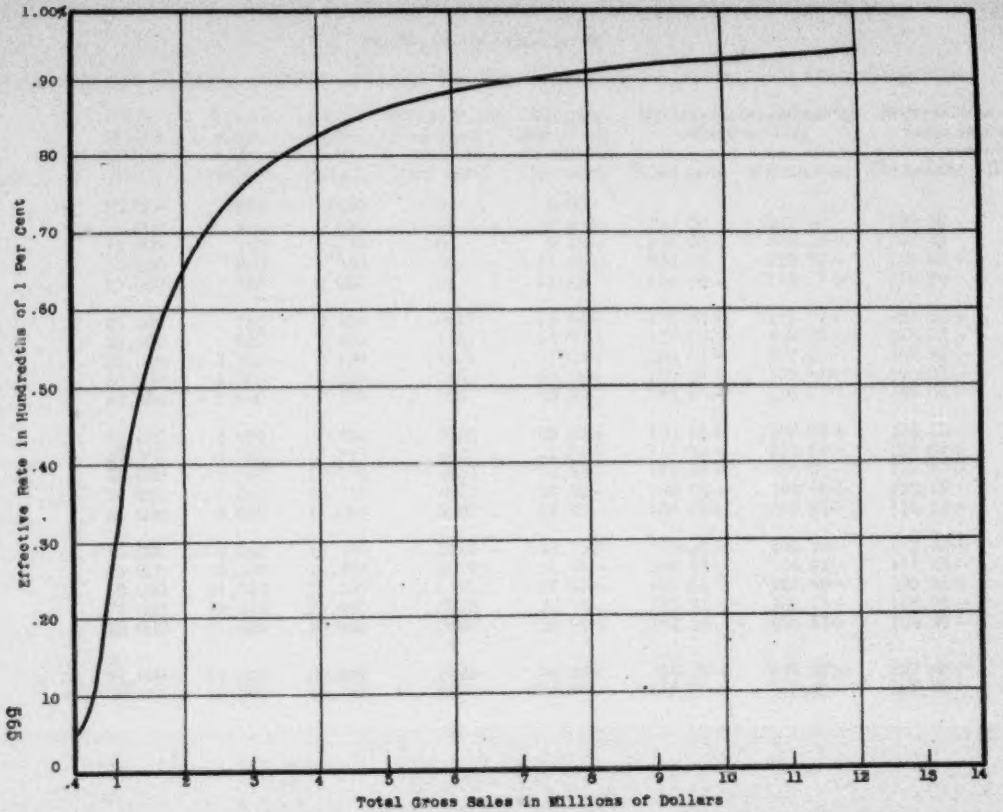
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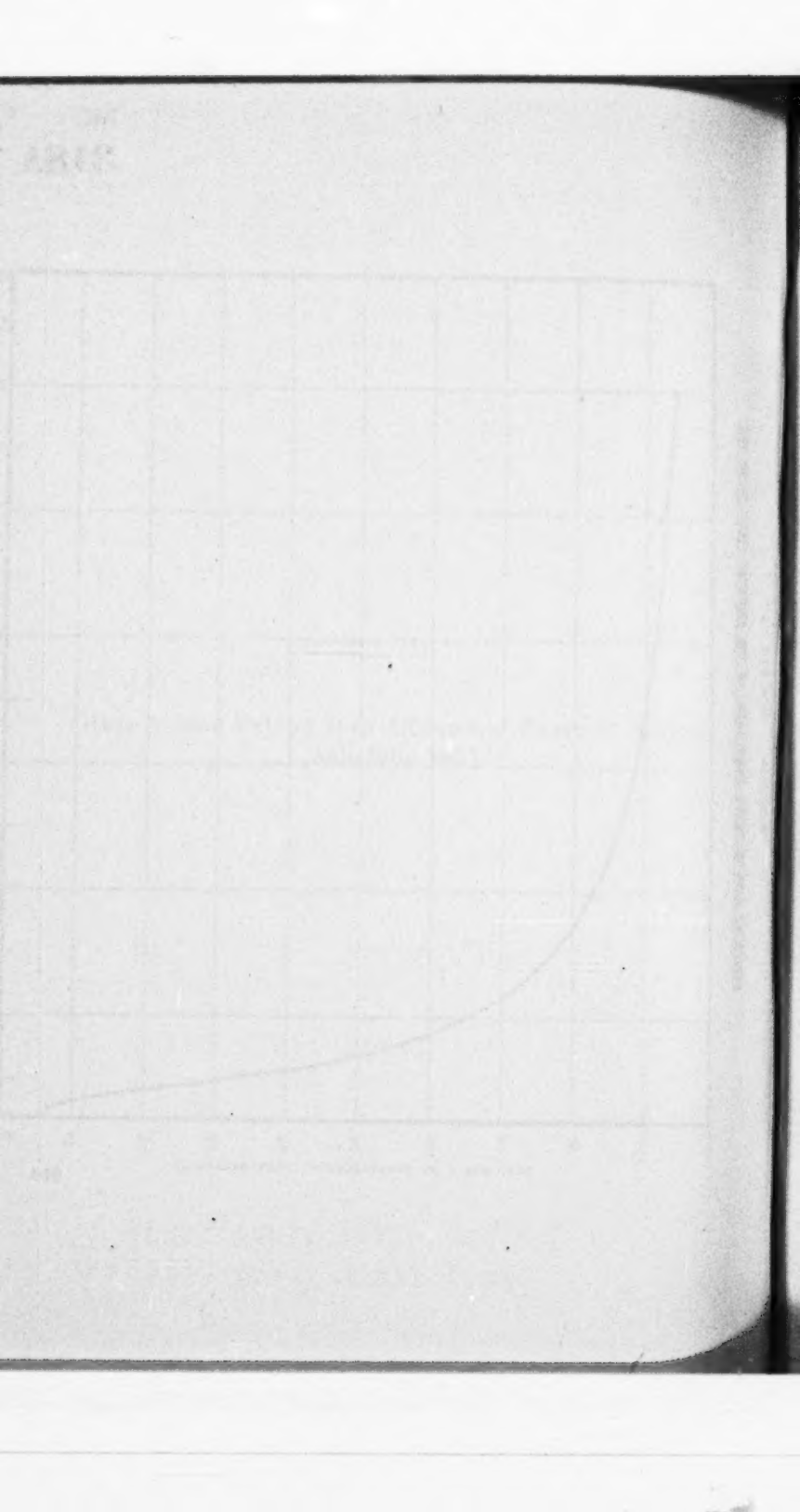
10,800,000—$10,900,000.....	"	10,900,000	"	102,050	.93624	6/10,000
10,900,000— 11,000,000.....	"	11,000,000	"	103,050	.93682	6/10,000
11,000,000— 11,100,000.....	"	11,100,000	"	104,050	.93739	6/10,000
11,100,000— 11,200,000.....	"	11,200,000	"	105,050	.93795	6/10,000
11,200,000— 11,300,000.....	"	11,300,000	"	106,050	.93850	6/10,000
11,300,000— 11,400,000.....	"	11,400,000	"	107,050	.93904	5,10/000
11,400,000— 11,500,000.....	"	11,500,000	"	108,050	.93957	5/10,000
11,500,000— 11,600,000.....	"	11,600,000	"	109,050	.94009	5/10,000
11,600,000— 11,700,000.....	"	11,700,000	"	110,050	.94060	5/10,000
11,700,000— 11,800,000.....	"	11,800,000	"	111,050	.94110	5/10,000
11,800,000— 11,900,000.....	"	11,900,000	"	112,050	.94160	5/10,000
11,900,000— 12,000,000.....	"	12,000,000	"	113,050	.94208	5/10,000

(Here follows Exhibit D to Affidavit of Henry F. Walradt, side folio 565.)

WALRADT - EXHIBIT "D"

EFFECTIVE RATE ON TOTAL GROSS SALES OF THE KENTUCKY GROSS SALES TAX





Gross Sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 4% of Gross Sales

Gross sales	Net income (4% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
$100,000	$4,000	$50	$120	.05	3.00	.....	.....	.....	.....
200,000	8,000	100	530	.05	6.63−	100.00	221.00	200.00	441.67−
300,000	12,000	150	1,150	.05	9.58+	100.00	144.49+	150.00	216.98+
400,000	16,000	200	1,850	.05	11.56+	100.00	120.67−	133.33+	160.87−
500,000	20,000	300	2,630	.06	13.15	120.00	113.75+	150.00	142.16+
600,000	24,000	550	3,490	.0917	14.54+	152.83+	110.57+	183.33+	132.70−
700,000	28,000	950	4,430	.1357	15.82+	147.98+	108.80+	172.73−	126.93+
800,000	32,000	1,500	5,450	.1875	17.03+	138.17+	107.65−	157.89+	123.02+
900,000	36,000	2,200	6,550	.2444	18.19+	130.35−	106.81+	146.67−	120.18+
1,000,000	40,000	3,050	7,730	.305	19.33−	124.80−	106.27−	138.64−	118.02−
1,100,000	44,000	4,050	8,990	.3682	20.43+	120.72+	105.69+	132.79−	116.30+
1,200,000	48,000	5,050	10,330	.4208	21.52+	114.29−	105.34−	124.69+	114.91−
1,300,000	52,000	6,050	11,750	.4654	22.60−	110.60−	105.02−	119.80+	113.75−
1,400,000	56,000	7,050	13,250	.5036	23.66+	108.23−	104.69+	116.53−	112.77−
1,500,000	60,000	8,050	14,830	.5367	24.72−	106.57+	104.48+	114.18+	111.92+
1,600,000	64,000	9,050	16,490	.5656	25.77−	105.38+	104.25−	112.42+	111.19+
1,700,000	68,000	10,050	18,230	.5912	26.81−	104.53−	104.04−	111.05−	110.55+
1,800,000	72,000	11,050	20,050	.6139	27.85−	103.84−	103.88−	109.95+	109.98+
1,900,000	76,000	12,050	21,950	.6342	28.88+	103.31−	103.70−	109.05−	109.48−
2,000,000	80,000	13,050	23,930	.6525	29.91+	102.89−	103.57−	108.30−	109.02+
[fol. 567]									
2,100,000	84,000	14,050	25,990	.6690	30.94+	102.53−	103.44+	107.66+	108.61−
2,200,000	88,000	15,050	28,130	.6841	31.97−	102.26−	103.33−	107.12−	108.23+

DR. WALRADT—EXHIBIT E—Continued

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 4% of Gross Sales

Gross sales	Net income (4% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
2,300,000	92,000	16,050	30,350	.6978	32.99−	102.03−	103.19+	106.64+	107.89+
2,400,000	96,000	17,050	32,650	.7104	34.01+	101.81−	103.09	106.23+	107.58−
2,500,000	100,000	18,050	35,030	.7220	35.03	101.63+	103.00−	105.87−	107.29−
3,750,000	150,000	31,000	67,030	.8267	44.69−	114.50+	127.58−	171.75−	191.35+
5,000,000	200,000	43,050	101,030	.8610	50.52−	104.15−	113.05−	138.87+	150.72+
7,500,000	300,000	68,050	173,030	.9073	57.68−	105.38−	114.17+	158.07+	171.27−
10,000,000	400,000	93,050	248,030	.9305	62.01−	102.56−	107.51−	136.74−	143.35−
12,000,000	480,000	113,050	308,030	.94208	64.17+	101.24+	103.48+	121.49+	124.19+
12,500,000	500,000	118,050	323,030	.9444	64.61	100.25−	100.69−	104.42+	104.87−

[fol. 568]

DR. WALRADT—EXHIBIT F

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 3% of Gross Sales

Gross sales	Net income (2% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
$100,000	$3,000	$50	$60	.05	2.00	.....	.....	.....	.....
200,000	6,000	100	250	.05	4.17−	100.00	208.5	200.00	416.67−
300,000	9,000	150	680	.05	7.56−	100.00	181.29+	150.00	272.00
400,000	12,000	200	1,150	.05	9.58+	100.00	126.72−	133.33+	169.12−
500,000	15,000	300	1,670	.06	11.13+	120.00	116.18−	150.00	145.22−
600,000	18,000	550	2,230	.0917	12.39−	152.83+	111.32+	183.33+	133.53+
700,000	21,000	950	2,840	.1357	13.52+	147.98+	109.12+	172.73−	127.35+
800,000	24,000	1,500	3,490	.1875	14.54+	138.17+	107.54+	157.89+	122.89−
900,000	27,000	2,200	4,190	.2444	15.52−	130.35−	106.74+	146.67−	120.06−
1,000,000	30,000	3,050	4,930	.305	16.43+	124.80−	105.86+	138.64−	117.66+

1,100,000	33,000	4,050	5,720	.3682	17.33+	120.72+	105.48−	132.79−	116.02+
1,200,000	36,000	5,050	6,550	.4208	18.19+	114.29−	104.96+	124.69+	114.51+
1,300,000	39,000	6,050	7,430	.4654	19.05+	110.60−	104.73−	119.80+	113.44−
1,400,000	42,000	7,050	8,350	.5036	19.88+	108.23−	104.36−	116.53−	112.38+
1,500,000	45,000	8,050	9,320	.5367	20.71+	106.57+	104.18−	114.18+	111.62−
1,600,000	48,000	9,050	10,330	.5656	21.52+	105.38+	103.91+	112.42+	110.84−
1,700,000	51,000	10,050	11,390	.5912	22.33+	104.53−	103.76+	111.05−	110.26+
1,800,000	54,000	11,050	12,490	.6139	23.13−	103.84−	103.58+	109.95+	109.66−
1,900,000	57,000	12,050	13,640	.6342	23.93−	103.31−	103.46−	109.05	109.21−
2,000,000	60,000	13,050	14,830	.6525	24.72−	102.89−	103.30+	108.30−	108.72+
[fol. 569]									
2,100,000	63,000	14,050	16,070	.6690	25.51−	102.53−	103.20−	107.66+	108.36+
2,200,000	66,000	15,050	17,350	.6841	26.29−	102.26−	103.06−	107.12−	107.97−
2,300,000	69,000	16,050	18,680	.6978	27.07+	102.03−	102.97−	106.64+	107.67−
2,400,000	72,000	17,050	20,050	.7104	27.85−	101.81−	102.88+	106.23+	107.33+
2,500,000	75,000	18,050	21,470	.7220	28.63−	101.63+	102.80+	105.87−	107.08+
2,600,000	78,000	19,050	22,930	.7327	29.40−	101.48+	102.69−	105.54	106.80+
2,700,000	81,000	20,050	24,440	.7426	30.17+	101.35+	102.62−	105.25−	106.59−
2,800,000	84,000	21,050	25,990	.7518	30.94+	101.24−	102.55+	104.99−	106.34+
2,900,000	87,000	22,050	27,590	.7603	31.71+	101.13	102.49−	104.75	106.16−
3,000,000	90,000	23,050	29,230	.7683	32.48−	101.05+	102.43−	104.54−	105.94+
3,100,000	93,000	24,050	30,920	.7758	33.25−	100.98−	102.37+	104.34−	105.78+
3,200,000	96,000	25,050	32,650	.7828	34.01+	100.90+	102.29−	104.16−	105.60−
3,300,000	99,000	26,050	34,430	.7894	34.78−	100.84+	102.26+	103.99+	105.45+
3,400,000	102,000	27,050	36,310	.7956	35.60−	100.79−	102.36−	103.84−	105.46+
3,500,000	105,000	28,050	38,230	.8014	36.41−	100.73−	102.28−	103.70−	105.29−
5,000,000	150,000	43,050	67,030	.861	44.69−	107.44−	122.74+	153.48−	175.33+
8,000,000	240,000	73,050	129,830	.9131	54.10	106.05+	121.06−	169.69−	193.69−
10,000,000	300,000	93,050	173,030	.9305	57.68−	101.91−	106.62−	127.38−	133.27+
12,000,000	360,000	113,050	218,030	.94208	60.56+	101.24+	104.99+	121.49+	126.01−
12,500,000	375,000	118,050	229,280	.9444	61.14+	100.25−	100.96−	104.42+	105.16−

[fol. 570]

DR. WALRADT—EXHIBIT G

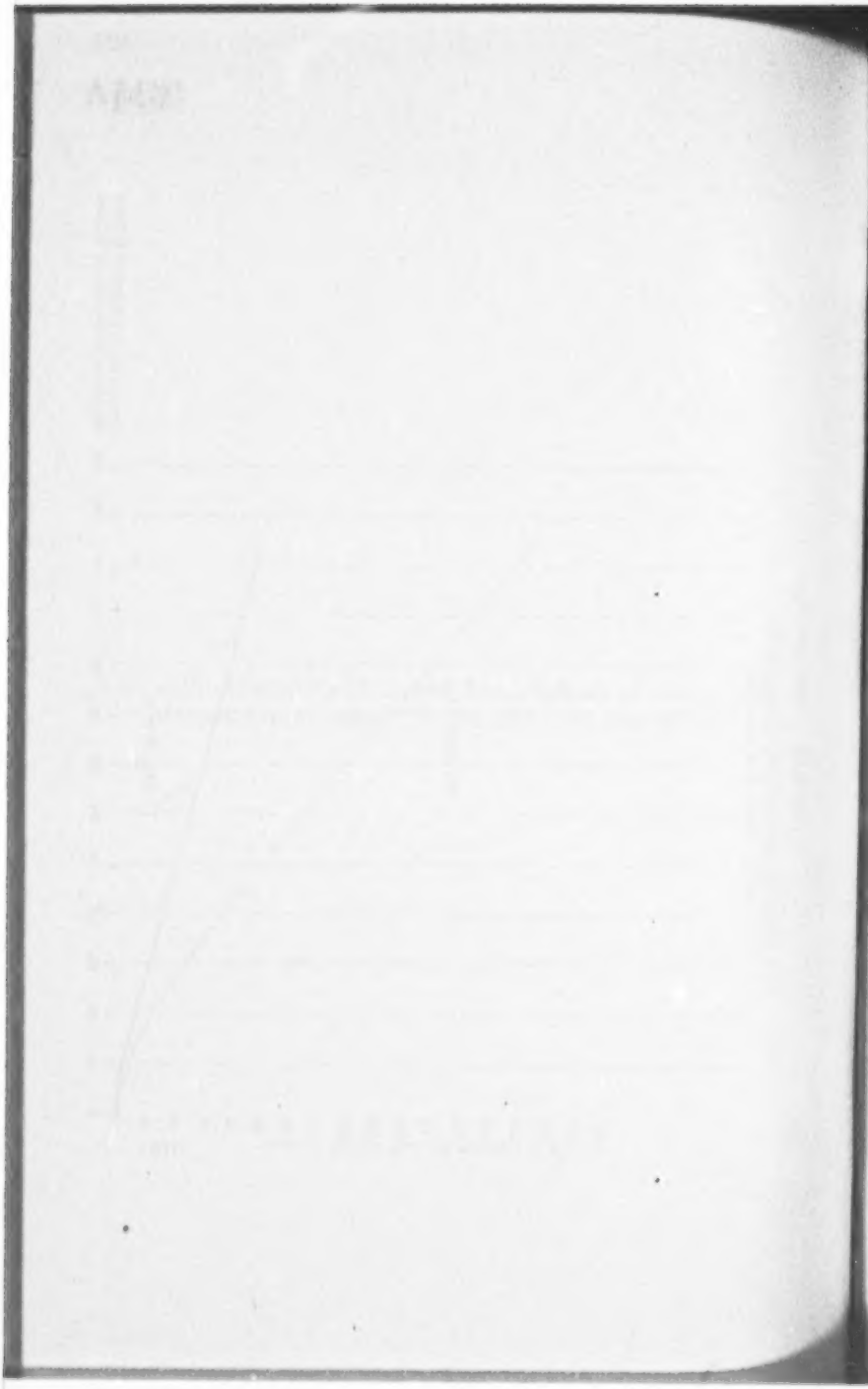
Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 2% of Gross Sales

Gross sales	Net income (2% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
$100,000	$2,000	$50	$0	.05	0.	.....	.....	.....	.....
200,000	4,000	100	120	.05	3.00	100.	.....	200.00	.....
300,000	6,000	150	250	.05	4.17	100.	139.00	150.00	283.33+
400,000	8,000	200	530	.05	6.83	100.	161.39+	133.33+	212.00
500,000	10,000	300	830	.06	8.3	120.	121.52+	150.00	156.60+
600,000	12,000	550	1,150	.0917	9.58	152.83+	115.42+	183.33+	138.55+
700,000	14,000	950	1,490	.1357	10.64	147.98+	111.06+	172.73−	129.57−
800,000	16,000	1,500	1,850	.1875	11.56	138.17+	108.65−	157.89+	124.16+
900,000	18,000	2,200	2,230	.2444	12.39	130.35−	107.18−	146.67−	120.54+
1,000,000	20,000	3,050	2,630	.305	13.15	124.80−	106.13+	138.64−	117.94−
1,100,000	22,000	4,050	3,050	.3682	13.86	120.72+	105.40	132.79−	115.97−
1,200,000	24,000	5,050	3,490	.4208	14.54	114.29−	104.91−	124.69+	114.43−
1,300,000	26,000	6,050	3,950	.4654	15.19	110.60−	104.47+	119.80+	113.18+
1,400,000	28,000	7,050	4,430	.5036	15.82	108.23−	104.15−	116.53−	112.15+
1,500,000	30,000	8,050	4,930	.5367	16.43	106.57+	103.86−	114.18+	111.29−
1,600,000	32,000	9,050	5,450	.5656	17.03	105.38+	103.65+	112.42+	110.55−
1,700,000	34,000	10,050	5,990	.5912	17.62	104.53−	103.46+	111.05−	109.91−
1,800,000	36,000	11,050	6,550	.6139	18.19	103.84−	103.23+	109.95+	109.35−
1,900,000	38,000	12,050	7,130	.6342	18.76	103.31−	103.13+	109.05−	108.85+
2,000,000	40,000	13,050	7,730	.6525	19.33	102.89−	103.04−	108.30−	108.42−
[fol. 571]									
2,100,000	42,000	14,050	8,350	.6690	19.88	102.53−	102.84+	107.66+	108.02+
2,200,000	44,000	15,050	8,990	.6841	20.43	102.26−	102.77−	107.12−	107.66+
2,300,000	46,000	16,050	9,650	.6978	20.98	102.03−	102.69+	106.64+	107.34−
2,400,000	48,000	17,050	10,330	.7104	21.52	101.81−	102.57+	106.23+	107.05−

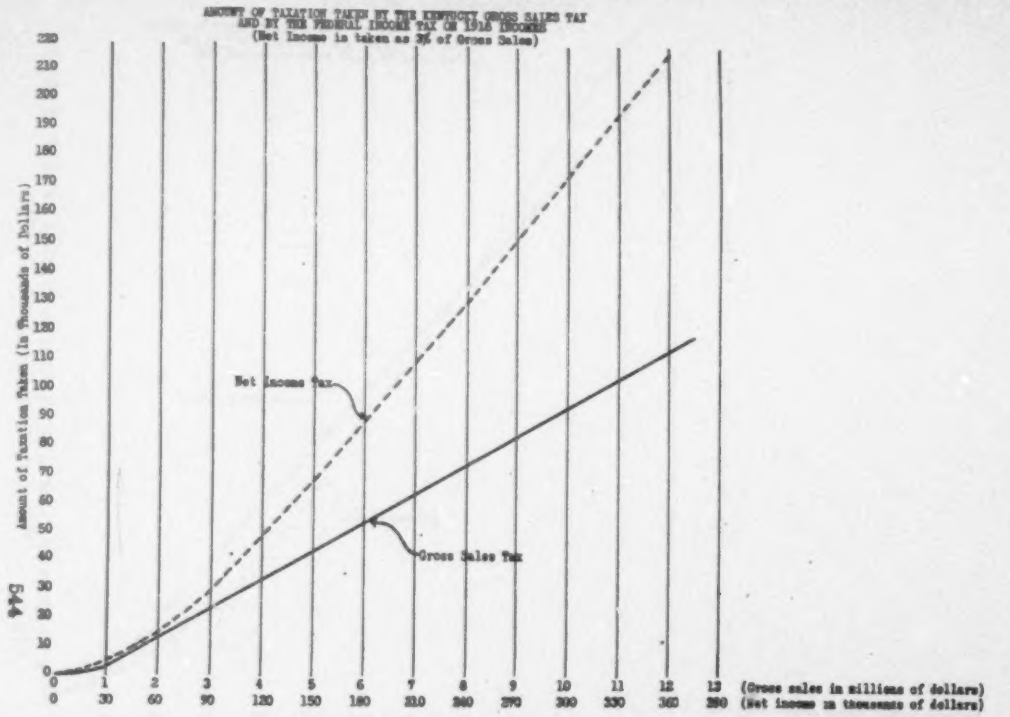
2,500,000	50,000	18,050	11,030	.722	22.06	101.63+	102.51−	105.87−	106.78−
2,600,000	52,000	19,050	11,750	.7327	22.60	101.48+	102.45−	105.54	106.53−
2,700,000	54,000	20,050	12,490	.7426	23.13	101.35+	102.35−	105.25−	106.30−
2,800,000	56,000	21,050	13,250	.7518	23.66	101.24−	102.29+	104.99−	106.08+
2,900,000	58,000	22,050	14,030	.7603	24.19	101.13	102.24	104.75	105.89−
3,000,000	60,000	23,050	14,830	.7683	24.72	101.05+	102.19	104.54−	105.70+
3,100,000	62,000	24,050	15,650	.7758	25.242	100.98−	102.11+	104.34−	105.53−
3,200,000	64,000	25,050	16,490	.7828	25.766	100.90+	102.08−	104.16−	105.37−
3,300,000	66,000	26,050	17,350	.7894	26.288	100.84+	102.03−	103.39+	105.22−
3,400,000	68,000	27,050	18,230	.7956	26.809	100.79−	101.98+	103.84−	105.07+
3,500,000	70,000	28,050	19,130	.8014	27.329	100.73−	101.94−	103.70−	104.94−
3,600,000	72,000	29,050	20,050	.8069	27.847	100.69−	101.90−	103.57−	104.81−
3,700,000	74,000	30,050	20,990	.8122	28.365	100.66−	101.86	103.44+	104.69−
3,800,000	76,000	31,050	21,950	.8171	28.882	100.60+	101.82+	103.33−	104.57+
3,900,000	78,000	32,050	22,930	.8218	29.397	100.58−	101.78+	103.22	104.46+
4,000,000	80,000	33,050	23,930	.8263	29.913	100.55−	101.76−	103.12	104.36+
4,100,000	82,000	34,050	24,950	.8305	30.427	100.51−	101.72−	103.03−	104.26+
4,200,000	84,000	35,050	25,990	.8345	30.940	100.48+	101.69−	102.94−	104.17−
4,300,000	86,000	36,050	27,050	.8384	31.453	100.47−	101.66−	102.85+	104.08−
4,400,000	88,000	37,050	28,130	.8420	31.966	100.43−	101.63+	102.77+	103.99+
4,500,000	90,000	38,050	29,230	.8456	32.478	100.43−	101.60+	102.70−	103.91+
4,600,000	92,000	39,050	30,350	.8489	32.989	100.39+	101.57+	102.63−	103.83+
4,700,000	94,000	40,050	31,490	.8521	33.5	100.38−	101.55−	102.56+	103.76−
4,800,000	96,000	41,050	32,650	.8552	34.01	100.36+	101.52+	102.50−	103.68+
4,900,000	98,000	42,050	33,830	.8582	34.52	100.35+	101.50−	102.44−	103.61+
5,000,000	100,000	43,050	35,030	.861	35.03	100.33−	101.48−	102.38−	103.55−
[fol. 572]									
7,500,000	150,000	68,050	67,030	.90733	44.69	105.38+	127.58−	158.07+	191.35+
8,000,000	160,000	73,050	73,830	.9131	46.14	100.64−	103.24+	107.35−	110.14+
10,000,000	200,000	93,050	101,030	.9305	50.52	101.91−	109.49+	127.38−	136.84+
12,000,000	240,000	113,050	129,830	.94208	54.10	101.24+	107.09−	121.49+	128.06−
12,500,000	250,000	118,050	137,030	.9444	54.81	100.25−	101.31+	104.42+	105.55−

(Here follow Exhibits H, I, and J to affidavit of Herman F. Walradt, side folios 573, 574, 575, 576, and 577.)

WALRADT - "EXHIBIT "E"
Net Income Tax
Gross Sales Tax
Amount of Taxation Taken (In Thousands of Dollars)
(Gross sales in millions of dollars)
(Net income in thousands of dollars)



WALRADT - EXHIBIT "I"



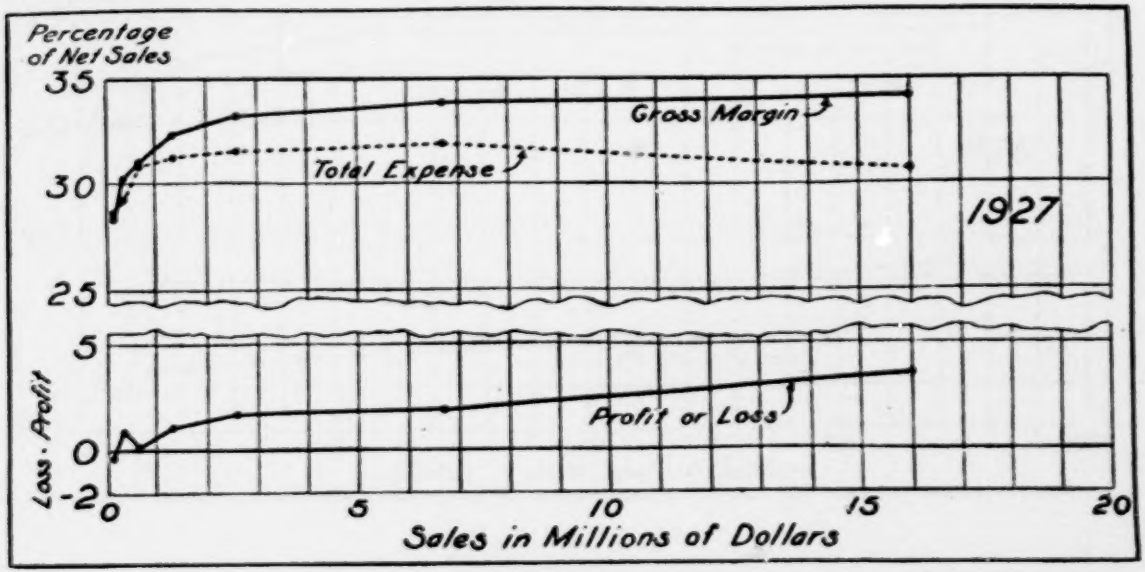
544

3248

Amount of Taxation Taken (in Thousands of Dollars)
Gross Income in Millions of Dollars
Net Income in Thousands of Dollars
Gross Income Tax
Net Income Tax

Chart 1. Typical Operating Results as Related to Sales Volume for Seven Groups of Department Stores: 1927

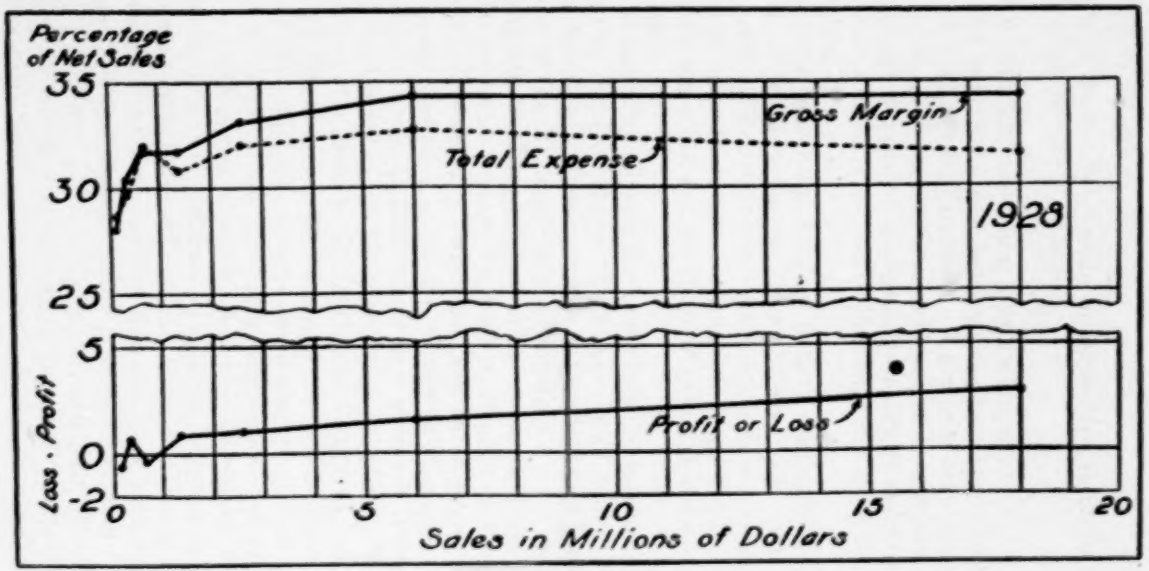
(Based on 508 Reports)



576
149
3240



Department Stores: 1928
(Based on 413 Reports)



677
150
3041

[fol. 578] AFFIDAVIT OF JAMES W. MARTIN

STATE OF KENTUCKY,
County of Franklin, ss:

Affidavit of James W. Martin in opposition to plaintiff's motion for interlocutory decree.

James W. Martin, first being duly sworn, says:

I am, and have for about two and one-half years been, a resident of Lexington, Kentucky. I am now employed by the University of Kentucky as Professor of Economics and Director of the Bureau of Business Research in the College of Commerce, and have served in that capacity since I came to Lexington.

Immediately preceding, for four years I was employed as Professor of Economics in Emory University, Atlanta, Georgia; and, while employed by Emory, was a member of the Georgia Manufacturers Association Committee to investigate the tax system of the State of Georgia and its local subdivisions.

Prior to that time, I was for two years an instructor in economics at the University of Chicago, and, while there, served as Assistant to the Chairman of the Highway Finance Committee of the National Tax Association.

My graduate training in Economics comprised one and one-fourth years at George Peabody College and Vanderbilt University, Nashville, Tennessee, and three years, some of which were part-time, at the University of Chicago. This included the summer of 1927, when as a research fellow of [fol. 579] the University of Chicago, I was detailed to Washington for investigations in the Library of Congress, Library of the Department of Agriculture, and other Washington libraries. I am a bachelor of arts and a master of arts.

I am a member of the American Economic Association; American Academy of Political Science; (English) Royal Economic Society; the National Municipal League; the National Tax Association; and the Tax Research Foundation. As a member of the National Tax Association, I have served for the current and last preceding year as Chairman of the Committee on Motor Vehicle Taxation; and I am President of the Tax Research Foundation, a non-profit corporation engaged in investigating State, local, Federal, and foreign tax systems.

Since 1923, I have been engaged in tax investigations among the most important of the results of which are a number of papers published largely by the National Municipal League, The National Tax Association, and the Social Science Research Council on Highway Finance, and the methods of research in Highway Finance. Other articles include an investigation of the possibilities of income taxation in Kentucky, two or three investigations of recent trends in taxation in the Southern States, certain papers on the recent economic development of Kentucky, several papers on tax administration, and an analysis of the State Tax System of Kentucky, now being published by the Tax Research Foundation.

[fol. 580] I have been engaged for several weeks in the collection of certain statistical data to be used in Court in the above styled case. I have prepared certain charts and exhibits filed herewith. These charts and exhibits are marked for identification, Martin Exhibit No. 1, Martin Exhibit No. 2, Martin Exhibit No. 3, Martin Exhibit No. 4, Martin Exhibit No. 5, Martin Exhibit No. 6, Martin Exhibit No. 7, Martin Exhibit No. 8, Martin Exhibit No. 9, Martin Exhibit No. 10, Martin Exhibit No. 11, Martin Exhibit No. 12, Martin Exhibit No. 13, and No. 13a, Martin Exhibit No. 14, Martin Exhibit No. 15, and Martin Exhibit No. 16, respectively. They were either prepared by me or under my personal supervision and direction, and are referred to hereinafter by their respective identifying numbers.

It has been my purpose to examine the operation of the Kentucky gross sales tax to determine the answer to five questions.

1. What are the actual rates? Are they, or are they not, the same as the plaintiffs imply in their petition?

2. What do operating statistics indicate with respect to the relative efficiency of cooperation as compared with actual consolidation in the retail field? To state this question differently, is it actually possible for retailers by voluntary cooperation to secure the advantages of large-scale operation to the same extent that they may be secured by retailers actually operating on a large scale?

[fol. 581] 3. Do large retailers actually have more or less taxable capacity than small ones? The answer to this ques-

tion should throw some light on the economic justification for the graduated scale of rates prescribed in Chapter 149, Acts of the General Assembly of 1930.

4. Is the graduation prescribed in the statute, or indeed any graduation at all, justifiable on the ground that the dealer operating on a large scale pays relatively less tax for State and local purposes, or for all purposes, than does the smaller one? If it is shown that this is the case, it may be possible to justify graduation of rates even in the absence of evidence that the larger retailer has more tax paying ability than the small one.

5. Assuming that the taxes imposed in the gross sales tax statute are not shifted to consumers by raising prices, are the rates so high as to be in effect confiscatory?

Before attacking these problems specifically, certain remarks concerning the basis and method of analysis should be made. Some of our analysis is based on secondary sources of information; that is, dependence has been placed on reports by the Harvard Bureau of Business Research and Moody's Reports which are in turn based on original data, namely, reports of merchants and corporate reports to stockholders respectively.

Due to pressure of time the original data necessary for our analysis could not be assembled in all cases. The statis- [fol. 582] tics submitted have two claims to consideration to which attention should be directed.

(1) In every instance, the statistics not collected from original sources are the work of agencies recognized throughout the worlds of economic scholarship and of business as being entirely reliable. Policies of well-managed department stores all over the country, for example, are determined in the light of results reported by the Harvard Bureau and unmeasured sums are invested or withdrawn from investment on the basis of Moody's reports.

(2) While the data offered are reliable, even where derived from secondary sources, they are not presented as data, but as a basis for statistical analysis. It is the analysis, not the raw figures, which is submitted as evidence in this matter. Even if the figures presented contained errors, which we do not believe, the substantial accuracy of our results would not, in the absence of mistakes so numerous and

extensive as to be unthinkable, be impugned. In other words, the exhibits below are to be regarded as units and not as statements of detailed data. Moreover, these data have been checked in a general way by a careful investigation of the problems involved and sometimes by direct comparison of different sources of information.

[fol. 583] I

From petitions which have been submitted by the Kroger Grocery and Baking Company, the J. C. Penney Company, the Stewart Dry Goods Company, and Levy Brothers, in the Eastern and Western Districts of Kentucky, it would appear that the rate on dealers who have sales of $1,000,000 or more is 1 per cent flat, whereas the rate on those who have only $400,000 to $1,000,000 of sales are graduated so that on the smaller the rate is 0.05 per cent and reaches 1 per cent on sales in excess of $1,000,000. The actual fact is that the rates are very much less severe than the petitions imply. For example, the rate which Levy Brothers would pay under the statute for the year 1930, assuming they have correctly stated taxable sales at $1,253,389.07, and computed the tax to be $5,449.28, would be 0.43 per cent. The tax on the J. C. Penney Company, again assuming accuracy of statement and competition, would be 0.54 per cent; that on the Stewart Dry Goods Company, 0.74 per cent; and that on the Kroger Company, assuming taxable sales to be $10,000,000 and accepting the company's statement with respect to offsets, would be 0.77 per cent. In other words, the tax rate is made considerably less than the apparent 1 per cent by (a) the very low rates on sales of less than $400,000 and (b) in some instances the offsets of license taxes which are permitted by the statute.

[fol. 584] A second point that should be noted in this connection is that graduation is not nearly so steep as the bare statement of the facts set forth in the several petitions tend to imply. This has already been illustrated in the cases cited. It will be further illustrated in the exhibits submitted herewith.

II

The facts with respect to the relative efficiency of unit stores operating on a small scale and large retailers,

whether operating in chains or not, are set forth in the exhibits discussed below. In a preliminary way, attention should be directed to the fact that some of the small-scale stores, the operating expenses of which have been analyzed below, do actually cooperate with other unit stores, while some do not. It appears from careful investigation of the subject-matter that in general there is distinct advantage in completely unified management, which makes itself manifest in lower operating expense, greater efficiency in purchasing, and higher rate of return on capital invested. Careful statistical analysis discloses that the prices at which small-scale retail grocers, for instance, actually sell, either in cooperative groups or not, are in general decidedly above the prices at which very large-scale competitors sell. One such investigation made in Lexington indicates that the most efficient of the small retailers, including those in the cooperative organizations, in the spring of 1930, sold [fol. 585] at price levels 3 or 4 per cent below the prices charged by the least efficient large-scale retailers. (The term "efficient" is here used to mean simply ability to sell at lower prices.)

III

Economic theorists have long urged, and in some instances have demonstrated, that large-scale enterprises are able to obtain certain economies of operation which small-scale operators cannot enjoy. Most investigations of this sort have been directed to manufacturing enterprises, but in recent years some attention has been given to the study of the relative efficiency of large-and-small-scale merchants. For present purposes at least, two aspects of this problem require analysis.

In Exhibit I the ratios of net gain of a large number of specialty stores to the sales of those retailers are shown. These data are available and are shown in the exhibit for the years 1927, 1928, and 1929. In 1929 they were so reported as to indicate the typical ratios for specialty stores having sales of $500,000 or less, for those having sales of between $500,000 and $2,000,000 and for those having sales of $2,000,000 and over. These data are based on reports of operating expense gathered from all parts of the United States. In 1927 and 1928 as shown in the exhibit, only two

classes, those having sales of $1,000,000 or less and those having sales of over $1,000,000 are reported.

[fol. 586] The significance of this exhibit for present purposes lies in the fact that, in all these instances, the several retailers have a very much higher ratio of net gain to net sales if they are large-scale than if small-scale merchants. This is equally true for each of the three years, the only years for which comparable information is available.

Exhibit II sets forth similar data for a large number of department stores scattered over the United States, including several in Kentucky. In each year the experience of department stores confirms that of the specialty already discussed in that earnings on sales were very much higher for large-scale enterprises than for the smaller-scale operators. In 1929, for instance, the retailers having sales of between $150,000 and $299,000 made an average of 2 per cent on sales, whereas those selling $10,000,000 or more during the year made an average of 5.3 per cent. The showing for the years 1928 and 1927 is even more conclusive (for department stores) than for the abnormal year 1929.

Another and more significant analysis of the reliability of the theory that large-scale operation makes possible certain economies unattainable for those who operate on a small scale is offered in a series of exhibits now being presented, showing the ratios of profits or net gain (by which we mean return on invested, borrowed as well as owed capital) to invested capital as shown by net worth, in certain types of retailing by size groups.

[fol. 587] Exhibit III shows the ratio of net profits to net worth of retail jewelry stores for the year 1927, the only year for which information is available. The exhibit indicates that the least efficient jewelers, speaking in terms of size-groups, are those having sales of between $20,000 and $49,000 each. On the average these incurred a loss of 0.7 per cent. The return ranges from this negative quantity on small stores to a positive 3.2 per cent on stores having $500,000 or over of sales. This exhibit may be accepted as a typical example of one of the less efficient retailing groups. It indicates that in no instance is the net return based on the investment of owners particularly generous. It approaches adequacy only in the case of those having net sales of $500,000 or over.

Exhibit IV shows the relation between net gain and the capital investment, as measured by net worth, of retail specialty stores scattered over the United States. (This is the same group of stores used in Exhibit I.) Analysis of this exhibit shows that large retailers in the specialty field appear to derive very much greater gains if they are large-scale operators than if they do business on a small scale or relatively small scale.

Exhibit V shows the ratio of net gain to net worth of department stores, both chain and independent, for the three years ending 1929. In 1927 and 1928 it will be observed that, as the size of the business increases, there [fol. 588] is an almost perfectly continuous tendency toward an increase of the rate of net gain to net worth. Even in the abnormal year 1929 this tendency, while not absolutely continuous, is certainly unmistakable.

Summarizing these evidences, it may be said that the effectiveness of the merchant, as measured either in terms of ratio of net income or net gain to sales or of the ratio of net income or net gain to capital invested by owners, is greater in large than in small enterprises. The evidence all points to the conclusion that large-scale are more profitable than small-scale enterprises. This conclusion would imply, on the basis of generally accepted principles of justice in taxation, that it is justifiable to tax the large-scale operator at a higher rate than the dealer engaged in retailing on a small scale.

These conclusions are still further confirmed by analysis of data on retailing for 1930 published by the Census Bureau on or before January 28, 1931. All cases so published, in which the distribution in detail is shown, are included in the analysis presented in Exhibit VI. The significant part of this exhibit is column four, headed "Turn-over" and to a certain extent column five, headed "Sales per Store." The term "turnover" as used in this and the next exhibit is not to be taken as the equivalent of the term as used by accountants because the Census Bureau values inventory (shown in column two) at cost and sales, of course, at selling price. To secure a ratio which could [fol. 589] be technically defined as "turn-over" it would be necessary to show both of these items according to the same method of valuation. This cannot be done on the basis of reports by the Census Bureau. It follows, therefore,

that if the mark-up employed in practice by a given class of retailers is large the figures shown in column four will be correspondingly large. Certain allowance for this error must be made as will be indicated below.

Careful examination of the table at the top of the page, from which data for Chicago are excluded on the ground that Chicago is so large as to be a city somewhat different from any to be found in the State of Kentucky, indicates that the larger the retail enterprise, generally speaking the greater the turnover with the modification that single store independents have a higher turn-over, as measured here, than do two-store multiples or three-store multiples. Undoubtedly this showing is contrary to the actual fact and appears as it does because of the large mark-up of single store independents. The data at the bottom of the page, where figures for Chicago are included, show the tendency even more clearly than do those with Chicago omitted. The apparent reason for this is that Chicago seems to be an exceptionally favorable area for chain store operation.

It must be observed that this exhibit, throwing together as it does, slow turn-over businesses like jewelry and rapid turn-over lines like cigars, is not wholly satisfactory. [fol. 590] Examination of Exhibit VII showing information similar to that just discussed for grocery and variety store owners tends to confirm the conclusion tentatively suggested already. These figures all clearly indicate that in a general business field the rate of turn-over is very definitely larger where the size of the retail enterprise is large. Grocery and variety stores have been chosen for this illustration because they are reported for a comparatively large number of cities, whereas department stores and specialty stores, for example, are reported for a relatively small number of places.

Here again the statistics are shown both with and without the Chicago data. If it is considered that Chicago is not typical of large cities in this State to the extent that it should be excluded, the data at the top of the page should be observed. If, on the other hand, it is believed that all data available to date should be considered, statistics at the bottom of the page will be more convincing.

As plaintiffs have urged in their petitions, rate of turn-over is a significant fact in retailing efficiency. That mer-

chant who secures the highest rate of turn-over, other things remaining the same, will enjoy the most profitable business. Consequently, it may be concluded on the basis of data already published from the Census of Distribution that, generally speaking, large-scale merchants enjoy a more profitable business than do small-scale operators.

[fol. 591] That the data shown above are actual comparisons of large with small-scale retailers is borne out by examinations of column five in the tables presented in Exhibits VI and VII. Examination of this column makes it entirely clear that in general two-store multiples have larger sales per store than single store independents; three-store multiples still larger sales, et cetera. From an examination of this column also, it may be concluded that the large-scale retailer must pay less in the way of managerial expense per unit of sales than must the small-scale dealer, since the former has so much greater average sales per store.

IV

If it is true that the large-scale grocer or variety store merchant or the retailer of any other class enjoys greater sales per store and, at the same time, higher rate of turn-over, it must follow that, if ad valorem taxes are assessed against different retailers, the small-scale operator will have to pay considerably more per dollar of sales than will the dealer operating on a large scale.

In Kentucky heretofore, and at the present time, the State and its local subdivisions secure general revenue primarily through the imposition of property taxes; consequently, when the inventory of the large-scale merchant is assessed it will constitute a decidedly less proportion of [fol. 592] the total goods sold during the year than will that property assessed against the small store owner.

It should also be observed that since turnover is higher and since in many cases the same warehouse may be used by the large-scale merchant, it is practicable to reduce the amount of goods on hand on July 1st, the day as of which ad valorem tax assessments are made, to a minimum figure. Some such reduction undoubtedly takes place in the stores of small merchants, but it is inconceivable that the small independent store is able to do this as effectively as the

larger store and particularly the large multiple-unit retailer.

Another strong indication that the property tax burden on large retailers is less than that on those doing a smaller business is provided by Exhibit VIII. A careful comparison of the last two columns make it clear that with rare exceptions, the large-scale dealer doing business both within and without the State of Kentucky have decidedly a larger percentage of business in Kentucky than of property. Indeed, the cases in which the contrary is true are so rare as to suggest that there is some extraordinary reason; and a careful investigation of the situation indicates that this is certainly true, at least in the case of Montgomery Ward and Company, which constitutes the most unexpected variation of this sort.

An examination of the annual report of this corporation to stockholders indicates that the total net sales of the corporation for the year 1929 were over $267,000,000 and [fol. 593] that the total gross sales of chain and department stores operated by the company were at practically $125,000,000; consequently there must be some error in the report to the State Tax Commission indicating aggregate sales of only $60,000,000. If this is the case it is not at all unlikely that the ratio of sales in Kentucky to total sales is higher than that shown in the exhibit. No details concerning the National Bellas Hess Company, the other extraordinary variant, are known, but there is doubtless some peculiar explanation of that company's higher ratio of property in Kentucky than of sales.

Exhibit IX shows that the taxes on different classes of retail stores operating in Louisville, Kentucky, in 1928 tend to decline as the sales of the store get larger. In the case of drug stores, for example, it will be observed that the very small merchant pays three times as much tax per dollar of sales as the merchant having sales of $100,000 or more. The merchant doing a general grocery business pays about six times as much tax in proportion to sales if he is one of the very small dealers, as he pays if his sales amount to $100,000 or more. The table indicates clearly that, if information available (that is, concerning merchants doing some kind of food business) is typical, the large merchant generally must pay less taxes, relatively speaking, than the small one.

[fol. 594] Exhibit X shows for the years 1927 to 1929 that the same conclusion applies to department stores in general. (Several of these are Kentucky retailers.) Examination of the table in any of the three years for which data are available, indicates that the very large merchant, that is, the merchant having $10,000,000 or more of sales, pays less than one-half as much tax per unit of business as the department store having less than $150,000 of sales. Generally speaking, the gradation is fairly even throughout the several groups.

On the basis, then, of the information available, it is fair to say that, not only does the large retailer enjoy greater tax-paying ability than the small one, but in actual practice at the present time he appears to pay less tax in proportion to amount of business than does his already handicapped competitor. Therefore, it may be suggested that the graduation of rates in the gross sales tax is justified, not only by greater taxable capacity on the part of the large retailer, but also by the fact that the payment of larger taxes will tend to equalize the tax burdens already imposed on large and small merchandising enterprises.

One other point in this connection shoud be made. Exhibit XI indicates that, taking the country as a whole, the tax burden resting on the department stores tends to decline with increase in the scale of operations at about the same rate whether the merchant is an independent, a co-[fol. 595] operative, or a chain dealer. The tax on the enterprise having $2,000,000 or more of sales is in either instance approximately one-half that imposed on those merchants having less than $500,000 of sales.

V

The allegation that the rates imposed in this statute are confiscatory, so far as the business of large-scale dealers is concerned, has been examined in several exhibits now to be submitted.

Exhibit XII constitutes a tabulation of the important corporations doing a retail business for which information concerning sales, net worth, and earnings could be had. The corporations include merchants doing chain store businesses, some doing both chain and mail order business, and perhaps some of still other types. An attempt was made

to include as many as possible of the principal retailers whose operating results could be determined, whether directly by examination of annual reports, or, if that were impossible, by the use of Moody's Manual of Industrials.

For the purpose of this analysis, it has been assumed that 5 per cent of the total sales, property, and net worth of the corporation is in Kentucky. This percentage was chosen because in round numbers it is the figure which shows the allocation of the business of the Kroger Grocery and Baking Company.

Some of the corporations included do not do business in this State at all, but they were included in the analysis [fol. 596] in order to give some indication of how their business would be affected if they chose to operate in this commonwealth, assuming that the sales tax is sustained.

The last two columns of the body of the table show for each individual corporation the ratio of net earnings to net worth before and after the application of the tax rates prescribed in the statute. In view of the fact that the assignment of business to Kentucky has been very generous, as indicated in exhibit VIII, the twelfth column in comparison with the eleventh, shows in general the application of the tax to businesses of the sort examined would not prevent these corporations from earning a substantial rate of return. Examination of column 6 in comparison with column 12 indicates that, if the tax were imposed at a flat rate of 1 per cent this conclusion would not be so valid.

The typical net result of the imposition of the tax rates prescribed in the Kentucky statute is even more clearly shown in the summary at the end of this table. The most significant part of the summary is found in columns ten, eleven and twelve. Column ten shows that the average concern having extremely large sales, the average of those having moderately large sales, the average of those having smaller sales, and the average of those having the smallest sales would be before any tax on sales. Column eleven makes it clear that, if a 1 per cent sales tax were applied in Kentucky the larger retailer, typified by those who have [fol. 597] presented petitions before the United States District Court, would still have average returns on net worth of 10 to 12.31 per cent, while those having average sales in Kentucky of less than $1,000,000 would be reduced to a de-

cidedly lower rate on owned investment, and the smallest group, on the average, would find itself unable or almost unable to continue in business.

Examination of column twelve shows that the application of the Kentucky sales tax with the graduated rates prescribed in the statute leaves the largest scale enterprises still earning, on the average, 12.49 per cent, the second largest scale, 11.61 per cent, and the third, 9.74 per cent, while the group of smallest merchants have their earnings on proprietorship reduced only to 7.79 per cent.

Summarizing, it may be said that, if these merchants are typical, the conclusion is perfectly obvious that the sales tax prescribed by the 1930 legislature, not only does not result in confiscation but tends to equalize the burdens on the merchants of various sizes who do business in Kentucky.

Exhibit XIII, in the main, is based on the figures presented in Exhibit VIII, namely, sworn statements by merchants reporting their sales within and without Kentucky. Only the fifth column, per cent earning on sales, is derived from other sources. As shown in the appendix to the table, this information is taken directly from the annual reports of corporations to stockholders or indirectly from the same [fol. 598] source through Moody's Investment Manual: Industrials, 1930, or Moody's special report.

Analysis of the results shown by this exhibit drives one to the same conclusion which was reached in the study of the Exhibit VII, that is, the comparison of the columns headed "Per cent Earned on Property Before Sales Tax," and "Per Cent Earned on Property After Sales Tax," indicates clearly that the imposition of the sales tax is not confiscatory even ignoring the license offsets which the law allows these various retailers.

Exhibit XIV is based on the same logic as Exhibit XIII but instead of using property invested in Kentucky and total property invested in the business, Exhibit XIV employs invested capital as measured by net worth, as shown in the annual report of the corporations to stockholders. It is assigned to Kentucky on the assumption (a decidedly generous one as shown above) that net worth in Kentucky to total net worth is in the same relation as sales in Ken-

tucky to total sales. The conclusions reached above in connection with the analysis of Exhibit XIII are almost equally obvious from a comparison of the two columns in the exhibit.

Exhibit XV is taken from a study of the leading chain stores of two different classes. It shows in the first table average ratio of net earnings to sales for four stores of each class over a period of ten years, 1920 to 1929 inclusive. The merit of this table does not lie in the large [fol. 599] number of cases included, but in the fact that they were selected as leading representative cases for an entirely different purpose, namely, investment analysis, and that the showing is highly favorable to these stores from the point of view of earnings on net sales.

The second table in Exhibit XV shows clearly that the earnings of large scale variety and grocery stores of the chain type are sufficiently large in proportion to net worth that the application of the rates prescribed in the Kentucky statute do not cut them down sufficiently to constitute confiscation. This is particularly obvious in the light of the first table which shows that the typical earnings on sales of variety stores in 1929 were 9 per cent, and on grocery stores, 2.6 per cent or 3.1 per cent, depending on what one regards as typical. Application of the rates in the statute would, of course, reduce the variety store earnings in 1929 of 16.8 per cent by one-ninth of that figure and computation may be made similarly for the grocery store earnings.

Exhibit XVI, a tabulation of all the cases (shown completely) selected by Moody to indicate the trend, shows in the second column unsolicited verification of the above conclusions. To reduce any of these figures by a fraction of one point would in no normal case result in cutting the ratio, shown in the last column but one, to a figure which would picture confiscation.

The conclusion from these analyses, then, is that application of the rates prescribed in the gross sales tax statute [fol. 600] would have the effect, if actually borne by the merchants, of taxing most heavily these, relatively speaking, with large tax paying ability, those who pay at the present time, least taxes to the commonwealth and its subdivisions, and in any event application of the rates do not,

except in rare instances, constitute so severe a burden on merchants as to make it impossible for them to continue in business. Indeed, the scale of rates provided will tend to bring about, but will not completely effect, an equalization of the tax burdens imposed on retail merchants of different sizes.

James W. Martin.

STATE OF KENTUCKY,
County of Franklin, Set.:

On this the 14 day of February, 1931, personally appeared before me, James W. Martin, who signed the foregoing affidavit in my presence and made oath to the truth of the statements therein contained.

B. T. Brewer, Notary Public, Franklin Co., Ky. My commission expires on the 9 day of Aug., 1931. (Seal of B. T. Brewer, Notary Public, Franklin County, Ky.)

[fol. 601] MARTIN—EXHIBIT No. I

Ratio of Net Gain to Net Sales from Operation of Specialty Stores, 1927-1929*

Net sales	1929 Number of stores	1929 Ratio	1928 Number of stores	1928 Ratio	1927 Number of stores	1927 Ratio
$500,000 or less	35	2.8%	Reported as shown below			
500,000–2,000,000	29	3.0				
2,000,000 or over	21	5.2				
1,000,000 or less	Reported as shown above		36	2.8%	36	2.1%
Over $1,000,000			28	5.8	31	6.1

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 602] MARTIN—EXHIBIT No. II

Ratio of Net Gain to Sales, Department Stores, 1927-1929*

Net sales	1929 Number stores	1929 Ratio	1928 Number stores	1928 Ratio	1927 Number stores	1927 Ratio
Less than $150,000	59	3.0%	Reported as shown below			
150,000– 299,000	83	2.0				
300,000– 499,000	84	2.2				
Less than 250,000	Reported as shown above		121	2.3%	140	3.0%
250,000– 499,000			69	3.4	98	3.6
500,000– 749,000	59	3.2	61	2.8	90	3.3
750,000– 999,000	36	3.0				
1,000,000– 1,999,000	73	3.1	55	3.8	82	3.8
2,000,000– 3,999,000	58	3.7	42	4.5	41	4.3
4,000,000–10,000,000	46	3.9	40	4.8	36	4.8
10,000,000 and over	29	5.3	25	5.8	21	6.1

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 603] MARTIN—EXHIBIT No. III

Ratio of Net Profits to Net Worth Retail Jewelry Stores, 1927*

Net sales	Number stores	Ratio net profits, sales
Less than $20,000	49	2.7%
20,000- 49,000	69	Loss 0.7
50,000- 99,000	40	1.1
100,000-499,000	53	1.9
500,000 or over	19	3.2

* As reported in Bulletin 76, Bureau of Business Research, Harvard University.

[fol. 604] MARTIN—EXHIBIT No. IV

Ratio of Net Gain to Net Worth from Operation of Specialty Stores, 1927-1929*

Net sales	1929 Number of stores	1929 Ratio	1928 Number of stores	1928 Ratio	1927 Number of stores	1927 Ratio
Less than $500,000	35	6.5%	Reported as		indicated	
500,000 to 2,000,000	29	11.5	below			
2,000,000 and over	21	14.0				
1,000,000 or less	Reported as		36	8.9%	36	7.0%
Over $1,000,000	indicated above		28	15.5	31	16.0

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 605] MARTIN—EXHIBIT No. V

Ratio of Net Gain to Net Worth in Department Stores—Chain and Independent*

Net sales	Number of stores, 1929	Ratio, 1929
Less than $150,000	59	6.3%
150,000 to 299,000	83	5.0
300,000 to 499,000	84	6.0
500,000 to 749,000	59	6.8
750,000 to 999,000	36	6.6
1,000,000 to 1,999,000	73	8.4
2,000,000 to 3,999,000	58	7.6
4,000,000 to 9,999,000	46	8.1
10,000,000 and over	29	11.3

	1928	1927	1928	1927
Less than $250,000	121	140	5.0%	6.2%
250,000 to $499,000	69	98	7.8	8.8
500,000 to 999,000	61	90	7.8	7.1
1,000,000 to 1,999,000	55	82	9.7	9.5
2,000,000 to 3,999,000	42	41	9.2	10.0
4,000,000 to 9,999,000	40	36	9.8	11.5
10,000,000 and over	25	21	12.1	13.5

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 606] MARTIN—EXHIBIT NO. VI

Aggregate Sales, Inventory, and Number of Stores by Type of Organization, All Stores Combined of All Cities so Far as Census Data (1930) Were Announced on or Before January 28

Type of organization	Number cities included	I Net sale (1929) (-000 omitted)	II Inventory, Dec. 31 cost (-000 omitted)	III Number of stores	IV Turnover, I/II	V Sales per store, I/III
Excluding Chicago						
Single-store independents	57	$1,429,340	$205,611	40,719	6.95	$35,103
Two-store multiples	46	161,417	27,360	2,237	5.90	72,158
Three-store multiples	55	84,043	13,350	987	6.30	85,150
Local chains (four stores and over)	55	171,816	21,975	2,105	7.82	81,623
Sectional chains	55	107,892	12,577	1,523	8.58	70,842
National chains	58	186,630	23,373	1,702	7.98	109,653
Including Chicago						
Single-store independents	..	2,517,300	352,761	75,666	7.14	33,269
Two-store multiples	..	299,102	48,135	4,255	6.21	70,294
Three-store multiples	..	173,215	25,124	1,731	6.89	100,066
Local chains (four stores and over)	..	421,350	45,671	4,416	9.23	95,414
Sectional chains	..	208,320	20,887	2,923	9.97	71,269
National chains	..	480,779	52,847	3,702	9.10	129,870

[fol. 607] MARTIN—EXHIBIT NO. VII

Aggregate Sales, Inventory, and Number of Stores by Type of Organization and Kind of Business for All Cities so Far as Census Data (1930) Were Announced on or Before January 28

Type of organization	Number cities included	I Net sales, 1929	II Inventory, Dec. 31 cost	III Number of stores	IV Turnover, I/II	V Sales per store, I/III
Excluding Chicago						
Grocery Stores:						
Single-store independents	27	$155,695,800	$10,414,042	6,566	14.95	$23,712
Local multi-units	26	38,719,068	2,828,727	632	13.69	61,168
Sectional and national chains	23	68,581,915	3,532,101	995	19.42	68,927
Variety, 5c to $1, Including General Stores:						
Single-store independents	18	6,758,462	1,514,968	258	4.46	26,196
Local multi-units	5	1,940,913	466,421	29	4.16	66,928
Sectional and national chains	18	24,220,827	3,392,027	85	7.14	284,951
Including Chicago						
Grocery Stores:						
Single-store independents	...	245,878,346	16,534,060	11,949	14.87	20,577
Local multi-units	...	52,174,190	3,799,835	895	13.73	58,295
Sectional and national chains	...	167,462,243	7,152,763	2,624	23.41	63,819
Variety, 5c to $1, Including General Stores:						
Single-store independents	...	13,538,755	3,720,110	597	3.64	22,678
Local multi-units	...	3,651,795	806,177	61	4.53	59,865
Sectional and national chains	...	52,402,610	6,637,912	232	7.89	225,873

[fol. 608]

EXHIBIT NO. IX TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Sales by Volume of Business, Louisville, 1928*

Kind of business	Less than $5,000	$5,000 to $9,999	$10,000 to $24,999	$25,000 to $49,999	$50,000 to $99,999	$100,000 and over	All
Bakeries	.8	.9	.7	.2a	...	...	.5
Confectioneries	1.2	.6	.3	.4	.8b	...	.8
Dairy and poultry product	.8	.3	.3	.1	.2	.5	.4
Delicatessen	1.0	.7	.4c	...	...	...	.5
Drug	.9	.6	.5	.3	.3	.3	.6
Fish and other sea food	.6	...	.1c	...	...	...	.1
Fruit and vegetable	.1	.5	.1c	...	...	...	.2
General department and variety	...	.1a	...	...	...	...	.1
Grocery	1.3	.6	.4	.2	.2	.2	.3
Hay, grain and feed	.2	.5	.5	.5	.1	.1	.1
Hotels	.5	.3	.3	.3	.2b	...	.2
Hucksters	.8	.3d	...	...	...	...	.6
Ice cream parlors	1.7	.6	.3c	...	...	...	.7
Meat market	.9	.3	.1	.1	.1b	...	.1
Pool rooms	1.7	.5e	...	...	...	...	1.0
Restaurants and lunch room	1.3	.6	.5	.4	.3f .2g	.3	.5

* U. S. Department of Commerce, Distribution of Cost Studies No. 6, "Louisville Grocery Survey."

a—$25,000 and over.
b— 50,000 and over.
c— 10,000 and over.
d— 5,000–12,000.
e— $5,000–$15,000.
f— 50,000– 74,999.
g— 75,000– 99,999.

Comparison of Investment with Sales in Kentucky by Retailers Doing Business Both Within and Without the State*

Name	Sales		Property invested		Per cent of sales in Ky.	Per cent of property in Ky.
	Total	In Kentucky	Total	In Kentucky		
Great A. & P. Tea Co	896,719,959	14,134,798	121,247,497	1,211,402	1.58	1.00
Kroger Grocery & Baking Co	286,811,215	12,635,115	43,949,979	1,500,439	4.41	2.35
S. S. Kresge Co	155,166,527	3,108,312	98,496,309	692,547	2.00	.70
F. W. Woolworth Co	308,047,172	2,422,358	136,307,460	505,815	.80	.37
J. C. Penny Co	200,600,417	2,164,974	76,955,449	697,300	1.08	.91
Sears Roebuck & Co	456,300,519	781,734	274,437,218	148,220	.17	.05
Montgomery Ward & Co	60,028,472	675,023	224,139,596	495,410	1.11	2.06
W. T. Grant Co	66,448,298	617,436	12,987,780	86,304	.94	.66
J. J. Newberry Co	27,789,309	451,279	19,029,685	245,029	1.62	1.29
Walgreen Co	4,590,316	448,963	2,133,774	95,580	9.59	4.48
McCrory Stores Corporation	44,706,253	437,911	27,935,356	213,447	.98	.76
Margolis, Inc	10,400,006	408,984	2,306,943	28,008	3.85	1.18
Melville Shoe Corp	25,320,675	377,824	7,029,209	64,357	1.48	.92
S. H. Kress Co	18,427,479	370,779	9,467,722	98,771	2.01	.94
Schulte United	19,363,432	302,940	14,771,348	205,536	3.49	1.23
G. C. Murphy Co	15,726,651	297,544	4,437,129	66,398	1.89	1.49
American News Co	37,021,197	264,140	4,584,209	14,481	.71	.32
Reliable Stores Corp	14,055,680	248,714	346,911	.....	1.77	.....
Jewel Tea Co., Inc	16,844,110	207,498	7,559,542	8,094	1.23	.11
Edison Brothers Stores, Inc	3,778,460	204,806	1,536,146	59,941	5.42	3.90
Western Auto Supply Co	15,169,440	204,658	6,593,989	26,360	1.28	.40
Stern Brothers Stores, Inc	7,870,635	200,617	7,564,514	84,729	2.55	1.12
Childs Co	24,127,725	165,060	9,422,372	3,509	.68	.03
Lerner Stores Corp	19,077,143	125,160	4,973,000	7,000	.66	.14

G. R. Kinney Co.	20,961,900	106,230	11,033,337	46,000	.51	.42
D. A. Schulte, Inc.	18,027,784	104,105	25,592,290	14,000	.58	.06
United Cigar Stores Co. of America	69,461,504	89,955	23,665,955	22,385	.13	.10
Feltman & Curme Shoe Store Co.	7,671,145	72,309	2,006,232	10,183	.94	.49
Schiff Co.	5,304,922	71,474	1,636,827	12,706	1.28	.88
B. & G. Sandwich Shops, Inc.	3,404,523	65,476	1,300,932	10,231	1.92	.75
C. F. Adams Co.	3,180,200	51,026	471,002	5,992	1.62	1.25
National Bellas Hess Co.	42,448,047	45,373	8,553,131	80,582	.11	.91
Federal Bake Shops of Missouri, Inc.	481,200	41,478	33,491	5,519	8.66	10.32
Ground Gripper Shoes, Inc.	1,148,864	28,925	726,350	9,003	2.98	1.25
Nunn Bush Shoe Co., Inc.	2,755,483	21,792	1,124,225	6,050	.75	.54
Metropolitan Chain Stores	18,065,558	13,200	14,506,000	27,000	.07	.19

* Source: Records of Kentucky State Tax Commission.

[fol. 610] EXHIBIT No. X TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Net Sales of Department Stores—Chain and Independent*

Net sales	Number of stores, 1929	Ratio of taxes to net sales, 1929
Less than $150,000	59	.65%
150,000 to 299,000	83	.6
300,000 to 499,000	84	.6
500,000 to 749,000	59	.6
750,000 to 999,000	36	.45
1,000,000 to 1,999,000	73	.4
2,000,000 to 3,999,000	58	.35
4,000,000 to 9,999,000	46	.35
10,000,000 and over	29	.3

	1928	1927	1928	1927
Less than $200,000	21	140	.7%	.7%
250,000 to 499,000	69	98	.7	.65
500,000 to 999,000	61	90	.65	.6
1,000,000 to 1,999,000	55	82	.5	.5
2,000,000 to 3,999,000	42	41	.5	.45
4,000,000 to 9,999,000	40	36	.45	.45
10,000,000 and over	25	21	.3	.3

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 611] EXHIBIT No. XI TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Net Sales—Department Stores Independently and Centrally Owned, 1929*

	Doing no group buying		Doing some group buying		In ownership group	
Net sales	Number of stores	Per cent	Number of stores	Per cent	Number of stores	Per cent
Less than $500,000	100	.6	55	.6	34	.6
$500,000 to $2,000,000	58	.45	43	.45	31	.5
$2,000,000 or more	45	.35	34	.3	44	.35

* Bulletin No. 83, Bureau of Business Research, Harvard University, pp. 34-35.

(Here follows Exhibit No. XII to Affidavit of James Martin, side folios 612 and 613.)

[fol. 612]

MARTIN—EXHIBIT No. XII

Statistics of Large Retail Stores Showing the Effect of Sales Tax

(-000 omitted)

	Total business						Kentucky data assuming 5% of total in State					
	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
	Net sales	Net profit after taxes	Net profit after 1% sales deducted	Net worth	Ratio, II/IV	Ratio, III/IV	Net sales	Profit before gross-sales tax	Profit after gross-sales tax	Net worth	Ratio, VIII/X	Ratio, IX/X
Atlantic and Pacific Tea Co	1053693	26220	15683	118771	22.08%	13.20%	52685	1311	791	5939	22.08%	13.32%
√Sears Roebuck & Co	405372	30058	26013	103441	29.05	25.15	20174	1503	1308	5172	29.05	25.29
√Woolworth, F. W. & Co	303047	35664	32634	158804	22.45	20.55	15152	1783	1639	7940	22.45	20.64
√Kroger Grocery & B. Co	286611	5919	3053	50549	11.74	6.04	14331	296	160	2527	11.74	6.33
√Montgomery Ward	267353	13435	10762	174457	7.70	6.17	13366	672	545	8723	7.70	6.25
√Safeway Stores	213496	6147	4012	37844	16.24	10.60	10675	307	208	1892	16.24	10.99
Penny, J. C. Co	209690	12413	10316	66612	18.63	15.49	10485	621	523	3331	18.63	15.70
√Kresge, S. S. Co. (5 & 10)	156457	14952	13388	83436	17.92	16.05	7823	748	676	4172	17.92	16.21
√American Stores	143346	6595	5161	43144	15.28	11.96	7167	330	265	2157	15.28	12.29
Gimbel Brothers	124636	804	442*	48316	1.66	.91*	6232	40	95*	2416	1.66	3.93*
Federated Department Stores	117003	4856	3686	27227	17.84	13.54	5850	243	191	1361	17.84	14.03
May Department Stores	112724	6175	5048	56161	11.00	8.99	5636	309	259	2808	11.00	9.22
√Hahn Department Stores	112323	4090	2967	43690	9.36	6.79	5616	205	155	2185	9.36	7.09
Drug, Inc	105000	17014	15964	59836	28.43	26.67	5250	851	805	2992	28.43	26.91
√National Tea Co	90201	2731	1829	17633	15.48	10.38	4511	137	98	882	15.48	11.60
McMarr	87238	2174	1301	11860	18.32	10.96	4362	109	72	593	18.32	12.41
√United Cigar Co	84679	2847	2000	72656	3.92	2.75	4234	142	107	3633	3.92	2.95
√First National Stores	75885	2905	2146	10974	26.46	19.55	3794	145	114	549	26.46	20.82
√Kress (S. H.) Co	68474	5521	4836	34785	15.87	13.90	3423	276	249	1739	15.87	14.32
√Grant (W. T.) Co	65902	3058	3299	20497	14.91	11.69	3295	153	127	1025	14.91	12.38
American News	56863	1625	1057	16049	10.13	6.59	2843	81	60	802	10.13	7.48
√City Stores	51695	2051	1534	30219	6.79	5.08	2585	103	84	1511	6.79	5.56
Mercantile Stores	48522	1069	583	16308	6.55	3.57	2426	53	36	815	6.55	4.43
National Bellas Hess	48312	214*	697*	14877	1.44*	4.69*	2416	11*	28*	744	1.44*	3.76*
Walgreen	46623	3130	2664	16034	19.52	16.61	2331	157	140	802	19.52	17.48
McCrory 5c to $1 Stores	44704	2223	1754	23137	9.51	7.58	2235	110	94	1157	9.51	8.18
Schulte Retail Stores	37420	4360	3986	29593	14.70	13.46	1871	218	206	1480	14.70	13.94
Mercantile Securities	42030	243	177*	23435	1.04	.76*	2102	12	2*	1172	1.04	.17*
√Grand Union	36943	1021	6519	6488	15.74	10.05	1847	51	40	324	15.74	12.35
√Daniel Reeves	33767	1128	791	4149	27.19	19.06	1688	56	46	207	27.19	22.22
√Fashion Park	32817	948	620	14302	6.63	4.34	1641	47	38	715	6.63	5.31
F. & W. Grand	30417	1813	1509	12320	14.71	12.24	1521	91	82	616	14.71	13.37
Childs	29952	1277	978	14625	8.73	6.69	1498	64	56	731	8.73	7.66
Bohack	28866	900	612	8914	10.09	6.85	1443	45	38	446	10.09	8.52
√United States Stores	28754	475	187	5756	8.25	3.25	1438	24	17	288	8.25	5.90
Spalding, A. G., Co	27866	2050	1772	20960	9.78	8.44	1393	103	96	1048	9.78	9.12
Newberry, J. J., Co	27789	1594	1316	15056	10.59	8.74	1389	80	73	753	10.59	9.69
√Shattuck	25656	3356	3091	25309	13.26	12.21	1283	168	162	1265	13.26	12.81
√Interstate Department Stores	25545	1102	846	6939	15.86	12.19	1277	55	49	347	15.86	14.20
√Melville Shoe	25521	1594	1339	7643	20.86	17.52	1276	80	74	382	20.86	19.37
√Dominion Stores	24641	591	344	4113	14.27	8.36	1232	30	24	206	14.27	11.75
Spiegel May Stern	23922	1718	1479	14768	11.63	10.01	1196	86	80	738	11.63	10.84
McLellan	23782	1001	764	9392	10.65	8.12	1189	50	45	479	10.65	9.57
√Kinney Shoe Co	20862	948	739	7693	12.32	9.61	1043	47	44	385	12.32	11.43
√Hartman Corp	20847	1103	900	16676	6.61	5.40	1042	55	52	834	6.61	6.24
Consolidated Retail Stores	19835	579	381	5362	10.79	7.10	992	29	26	268	10.79	9.70
√Lerner	19077	1385	1195	5422	25.54	22.03	954	69	67	271	25.54	24.57†

Consolidated Retail Stores	19853	579	381	5302	10.79	7.19	992	29	29	265	10.79	7.26
√Lerner	19077	1385	1195	5422	25.54	22.03	954	69	67	271	25.54	24.57†
Hale Bros	18449	310	126	5538	5.59	2.27	922	16	13	277	5.59	4.69
Oppenheim Collins	19854	1561	1363	9793	15.93	13.91	993	78	75	490	15.93	15.31
Kresge Department Store	17070	1391	1221	12064	11.53	10.12	854	69	67	603	11.53	11.11
√Jewel Tea Co	16844	1691	1524	6321	27.14	24.45	842	85	83	312	27.14	26.57
√Waldorf System	16362	1206	1042	6305	19.13	16.52	818	60	59	315	19.13	18.73
Diamond Shoe	16247	1187	1024	5604	21.18	18.27	812	59	58	280	21.18	20.71
Southern Grocery	16092	57*	218*	1471	3.87*	14.81*	805	3*	4*	74	3.87*	5.97*
Western Auto Supply Co	15960	533	373	5358	9.94	6.96	798	27	25	268	9.94	9.32
D. Pender Grocery	15921	288	129	2314	12.44	5.57	796	14	13	116	12.44	11.20
Thompson, John R., Co	15743	1585	1427	10348	15.30	13.79	787	79	78	617	15.30	15.04
Murphy	15726	897	740	6717	13.35	11.01	786	45	43	336	13.35	12.93
√Lane Bryant	17147	633	583	4415	14.33	13.20	780	31	30	221	14.33	13.57
√Peoples Drug	15543	894	738	5222	17.11	14.13	777	45	43	276	17.11	15.57
√Atlas Stores	15176	1154	1002	5614	20.55	17.84	759	58	56	281	20.55	20.10
√Neisner	15092	1025	874	5552	18.46	15.74	755	51	50	278	18.46	18.02
Best & Co	14614	1279	1133	6736	18.93	16.77	731	64	63	338	18.93	18.63
Reliable Stores	14218	1212	1069	7803	15.51	13.69	711	61	60	390	15.51	15.27
[fol. 613]												
National Grocery Co	13791	19	118*	2916	.65	4.04*	689	1	0.5	146	.65	.32
Miller, I. & Sons	13522	830	694	6553	12.66	10.59	678	41	41	328	12.66	12.50
Metropolitan Chain	13513	798	663	7534	10.59	8.78	676	40	39	377	10.59	10.37
Schulte United	12979	23	107*	10935	.21	.98*	649	1	0.3	533	.21	.06
Lobiaw Groceteria	12834	1094	966	4775	22.91	20.25	642	55	53	239	22.91	22.18
√Bauman, Ludwig & Co	11238	623	502	8061	7.73	6.21	562	31	30	403	7.73	7.62
Magnin, I. & Co	10984	706	596	5022	14.05	11.86	549	35	35	251	14.05	13.94
American Department Stores	10823	225	116	3478	6.46	3.33	541	11	11	174	6.47	6.32†
Mangel Stores	10600	229	123	2760	8.26	4.42	530	11	11	138	8.26†	8.02†
Economy Grocery	10561	272	166	1135	23.96	14.59	528	14	13	57	23.96	22.80
Daley's Incorporated	10037	121	28	1302	9.29	2.15	502	6	6	65	9.29	9.23
Happiness Candy	9757	239*	336*	4522	5.28*	7.43*	488	12*	12*	226	5.28*†	5.42*†
Park & Tilford	9348	1001	908	3298	30.36	27.50	467	50	50	165	30.36†	30.20†
Schiff & Co	9199	499	358	2577	19.37	13.85	460	25	25	129	19.37†	19.19†
Sterchi Stores	7888	379	300	6477	5.80	4.63	394	19	19	323	5.80	5.80
√Feltman & Curme	7671	33	43*	2126	1.55	2.02*	384	2	1	106	1.55	.94
√National Family	7003	852	782	5443	15.65	14.36	350	43	42	272	15.65	15.44
Loft, Incorporated	7001	151*	221*	9742	1.54*	2.26*	350	8*	8*	487	1.54*†	1.59*†
Exchange Buffet	6634	550	484	2450	22.44	19.75	332	28	28	123	22.44	22.44
Sherman Clay	6155	295*	357*	6258	4.71*	5.68*	308	15*	15*	313	4.71*†	4.77*†
√Winn & Lovett	6092	139	78	806	17.25	9.67	305	7	7	40	17.25	17.25
Crook, J. W	5990	36*	96*	848	4.24*	11.32*	299	2*	2*	42	4.24*	4.76*
√Katz Drug	5523	420	365	1565	26.83	23.32	276	21	21	78	26.83	26.83
Bickfords	5312	510	456	3226	15.78	14.14	266	25	25	161	15.78†	15.71†
Leath & Co	5201	492	440	2763	17.80	15.92	260	25	24	138	17.80	17.39
Neve Drug	5030	456*	506*	1382	32.99*	36.61*	251	23*	23*	69	32.99*	32.99
Nunn Bush Shoe Co	5019	329	278	2397	13.73	11.60	251	16	16	120	13.73	13.73
Trunz Pork	4976	316	266	1082	29.13	24.51	249	16	16	54	29.13†	28.94†
Southern Stores	4944	26*	75*	683	3.81*	10.98*	247	1*	1*	34	3.81*	3.81*
Ross Stores	4758	106	58	2307	4.59	2.51	238	5	5	115	4.59	4.59
√Federal Bake Shops	4490	241	196	1126	21.40	17.41	224	12	12	56	21.40	21.40
National Shirt	4469	211	166	1209	17.45	13.73	223	11	11	60	17.45	17.45
Shaffer Stores	3424	33	1*	1072	3.08	.93*	218	2	2	54	3.08	3.08
Sally Frocks	4154	310	269	682	45.52	39.35	208	16	15	34	45.52	45.19
Fanny Farmer Candy	4068	444	403	1446	30.71	27.87	203	22	22	72	30.71	30.71
Pig'n Whistle	3671	154	117	1708	9.02	6.85	184	8	8	85	9.02	9.02

Ross Stores	4498	106	88	2504	4.39	2.31	236	6	6	110	4.39	2.31
√Federal Bake Shops	4490	241	196	1126	21.40	17.41	224	12	12	56	21.40	21.40
National Shirt	4469	211	166	1209	17.45	13.73	223	11	11	60	17.45	17.45
Shaffer Stores	3424	33	1*	1072	3.08	.93*	218	2	2	54	3.08	3.08
Sally Frock	4154	310	269	682	45.52	39.35	208	16	15	34	45.52	45.19
Fanny Farmer Candy	4068	444	403	1446	30.71	27.87	203	22	22	72	30.71	30.71
Pig'n Whistle	3671	154	117	1708	9.02	6.85	184	8	8	85	9.02	9.02
Edison Brothers	3778	230	192	1441	15.96	13.32	189	12	11	72	15.96	15.96
Nedicks	3567	352	316	2022	17.41	15.63	178	18	17	101	17.41	17.41
Thompson Spa	3552	432	396	4007	10.77	9.85	178	22	21	200	10.77	10.72
B. & G. Sandwich	3405	133	99	897	14.83	11.04	170	7	7	45	14.83	14.83
Consolidated Automatic Merchandise	3116	555*	585*	5339	10.40*	10.96*	156	28*	28*	267	10.40*	10.40*
C. F. Adams	3163	81*	112*	1806	4.49*	6.20*	158	4*	4*	90	4.49*	4.49*
General Vending Corporation	2707	395*	422*	2062	19.16*	20.47*	135	20*	20*	103	19.16*	19.16*
Van de Kamp	2643	158	132	1148	13.76	11.50	132	8	8	57	13.76	13.76
Georgian	2607	120	94	1461	8.21	6.43	130	6	6	73	8.21	8.21
Fair Stores	2547	139	113	1051	13.13	10.75	127	7	7	53	13.13	13.06†
Crown Drug	2358	207	183	1100	18.79	16.63	118	10	10	55	18.79	18.68†
Ground Gripper	2017	129	109	1633	7.90	6.67	101	6	6	82	7.90	7.90
Nunally Co	1775	41	23	1649	2.49	1.39	89	2	2	82	2.49	2.49
Morrison Electric Co	1745	142	125	606	23.43	20.63	87	7	7	30	23.43	20.63†
Kaybee Stores	1582	216	200	890	24.27	22.47	79	11	11	45	24.27	24.27
Kane Stores	1530	159	144	1808	8.79	7.91	76	8	8	90	8.79	8.75†
Marylee Candies	1372	33*	46*	341	9.68*	13.49*	69	2*	2*	17	9.68*	9.68*
Chaffee	1220	39*	52*	486	8.02	10.70*	61	2*	2*	24	8.02*	8.02*
Allison Drug	1140	142	3	688	2.16	.50	57	1	1	34	2.16	2.08†

√ Taken from reports of corporations to stockholders where possible (marked√); otherwise from Moody's *Investment Manual: Industrials*, 1930. Data are for the year 1929 or for the fiscal year falling most largely in 1929.

† Ratio computed from actual figure instead of round numbers.

* Deficit.

Summary Showing Data in Aggregate

(-000 omitted)

	Total business						Kentucky data assuming 5% of total in State					
Sales group	I Number of merchants included	II Net worth	III Net profit before gross sales tax	IV Net profit after gross sales tax at 1% flat rate	V Ratio II/I	VI Ratio III/I	VII Kentucky net worth	VIII Net profit before gross sales tax	IX Net profit after Ky. gross sales tax at rates provided in statute	X Ratio VII/VI	XI Ratio net profit after 1% sales tax to net worth in Kentucky	XII Ratio VIII/VI
1,053,693–33,767	30	1,420,982	220,214	174,937	15.50%	12.31%	71,049	11,011	8,873	15.50%	12.31%	12.49%
32,817–15,543	30	276,720	34,553	28,144	12.49	10.17	13,836	1,728	1,606	12.49	10.17	11.61
15,176– 5,030	30	133,679	13,308	10,319	9.96	7.72	6,684	665	651	9.95	7.72	9.74
5,019– 1,140	29	44,147	3,615	1,589	8.19	3.60	2,207	181	172	8.20	3.60	7.79

[fol. 614]

MARTIN—EXHIBIT No. XIII

Effect of Sales Tax on Rate of Return on Property Investment of Retailers in Kentucky, 1929*

Name	Sales		Property invested		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on property	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Great A. & P. Tea Co.	896,719,959	14,134,788	121,247,407	1,211,462	2.8	395,774	261,376	32.67	21.58
Kroger Grocery & Baking Co.	286,611,215	12,635,115	63,940,978	1,500,620	2.07	261,546	142,146	17.42	9.47
S. S. Kresge	155,166,527	3,108,312	98,496,309	692,547	10.86	337,563	313,430	48.74	45.26
F. W. Woolworth	303,047,172	2,422,358	136,397,650	505,615	8.4	203,478	186,204	40.24	35.64
J. C. Penny	209,690,417	2,164,974	76,955,480	657,360	5.8	125,568	110,868	19.10	16.87
Sears Roebuck Co.	455,360,619	761,734	274,437,218	148,220	8.2	62,462	61,172	42.14	41.27
Montgomery Ward Co.	60,628,672	675,623	24,159,596	495,410	5.4	36,484	35,632	7.36	7.19
W. T. Grant	65,448,298	617,436	12,987,769	86,304	5.8	35,811	35,191	41.49	40.78
J. J. Newberry	27,789,369	451,279	19,020,685	245,620	6.8	30,687	30,436	12.49	12.39
Walgreen	4,680,305	448,953	2,133,774	95,580	7.0	31,427	31,178	32.88	32.62
McCrory Stores	44,706,253	437,011	37,935,356	213,447	7.1	31,028	30,791	14.54	14.43
Mangels, Inc.	10,600,006	408,084	2,366,843	28,008	2.95	12,038	11,830	42.98	42.24
Melville Shoes	25,520,675	377,824	7,029,269	64,357	5.9	22,292	22,103	34.50	34.34
S. H. Kress Co.	18,427,479	370,770	9,467,722	88,771	9.1	33,740	33,555	38.01	37.80
Schulte-United	10,363,432	362,040	16,771,348	205,836	6.57d	23,786d	23,967d	11.56d	11.64d
G. C. Murphy	15,726,651	297,544	4,457,129	66,358	6.01	17,882	17,733	26.95	26.72
American News Co.	37,021,107	264,160	4,584,269	14,631	2.67	7,053	6,921	48.21	47.30
Reliable Stores Corp.	14,055,480	248,714	346,911	.....	10.89	27,085	26,961	.....	.....
Jewel Tea Co.	16,844,110	207,498	7,559,542	8,604	9.4	19,505	19,401	226.70	225.49
Edison Brothers, Inc.	3,778,460	204,806	1,536,146	59,941	4.7	9,626	9,524	16.06	15.89

* Data in columns 1 to 4, inclusive, are based on tabulations by the State Tax Commission of statements given by the management of the corporations concerned. Source of column 5 is shown on appended table. Remaining columns were computed.

MARTIN—EXHIBIT No. XIII—Continued

Name	Sales		Property invested		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on property	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Western Auto Supply	15,959,440	204,658	6,563,989	26,300	2.32	4,748	4,646	18.05	17.67
Sterchi Brothers Stores	7,870,435	200,617	7,584,514	84,729	10.40	20,864	20,764	24.62	24.51
Childs Co.	24,127,725	165,050	9,433,572	3,009	6.1	10,068	9,985	334.60	331.84
Lerner, Inc.	19,077,143	125,160	4,973,000	7,000	6.8	8,511	8,448	121.59	120.69
G. R. Kenney Co.	20,861,960	106,230	11,033,337	46,690	6.3	6,692	6,639	14.33	14.22
United Cigar Stores	69,461,594	89,055	23,465,685	22,385	6.57d	5,851d	5,896d	26.14d	26.34d
Feltman & Curme Store	7,671,195	72,309	2,066,232	10,183	.50	362	326	3.55	3.20
Schiff Co.	5,364,922	71,474	1,436,827	12,706	5.4	3,860	3,824	30.38	30.10
B. & G. Sandwich	3,404,523	65,476	1,360,932	10,231	8.38	5,487	5,454	53.63	53.31
C. F. Adams	3,180,260	51,626	471,062	5,882	2.34d	1,208d	1,234d	20.54d	20.98d
National Bellas Hess	42,448,047	45,573	8,853,131	80,582	.17d	77d	100d	.10d	.12d
Federal Bake Shop of Missouri	481,260	41,678	53,491	5,519	8.0	3,334	3,313	60.41	60.03
Ground Gripper Stores	1,148,864	23,935	726,350	9,093	9.74	2,331	2,319	25.64	25.50
Nunn-Bush Shoe	2,785,483	21,792	1,124,325	6,050	9.06	1,974	1,963	32.63	32.45

• Data in columns 1 to 4, inclusive, are based on tabulations by the State Tax Commission of statements given by the management of the corporations concerned. Source of column 5 is shown on appended table. Remaining columns were computed.

[fol. 615] **Appeal to XIII**

MARTIN—EXHIBIT No. XIII

Appendix to Table on Effect of Sales Tax on Rate of Return on Investment of Retailers in Kentucky, 1929

Name	Total sales	Net operating income	Ratio net to sales
Great A. & P. Tea Co.	.....	.....	2.8%c
Kroger	.....	.....	2.07a
S. S. Kresge Co.	$156,458,000	$16,847,210	10.86*
F. W. Woolworth	303,047,000	25,420,000	8.4*
J. C. Penny	.....	.....	5.8c
Sears & Roebuck Co.	443,453,000	36,479,000	8.2*
Montgomery Ward & Co.	267,326,000	14,505,000	5.4*
W. T. Grant	65,902,000	3,829,000	5.8*
J. J. Newberry Co.	.....	.....	6.8c
Walgreen Co.	.....	.....	7.0c
McCrory	.....	.....	7.1c
Mangels, Inc.	10,600,008b	312,631b	2.95b
Melville Shoe	25,521,000	1,518,000	5.9*
S. H. Kress	68,474,000	6,222,000	9.1*
Schulte United	12,979,422b	853,186d b	6.57b
G. C. Murphy Co.	15,726,652b	944,559b	6.01b
American News	56,863,194b	1,519,246b	2.67b
Reliable Stores	14,217,783	1,547,652b	10.89b
Jewel Tea Co.	16,844,000	1,582,000	9.4*
Edison Brothers Stores	3,778,460b	179,313b	4.07b
Western Auto Supply	15,959,521b	370,348b	2.32b
Sterchi Bros. Stores	7,887,681b	820,359b	10.40b
Child's	.....	.....	6.1c
Lerner Stores Corp.	19,077,123b	1,297,542b	6.8b
G. R. Kinney	20,862,000	1,305,000	6.3*
United Cigar Stores Co.	84,679,557	5,561,372d	6.57*d
Feltman & Curme	7,671,196b	38,678b	.50b
Schiff & Co.	.....	.....	5.4c
B. & G. Sandwich	3,404,523	285,167b	8.38b
C. F. Adams	3,163,328b	73,781d b	2.34d b
National Bellas Hess	48,311,813b	80,064d b	.17d b
Federal Bake Shop of Missouri	4,490,000	360,000	8.0*
Ground Grippers Stores	2,017,188b	196,468b	9.74b
Nunn Bush Shoe	5,018,912b	454,747b	9.06b

* Information shown is taken from corporation annual reports to stockholders.

a—From Bill of Complaint, Kroger Grocery & Baking Co. *v.* Ky. Tax Commission *et al.*

b—Computed from Moody's Investment Manual: Industrials, 1930.

c—Ratio taken from Moody's Investors Service (Business and Industries Guide), Sept. 26, Oct. 16, and Dec. 11, 1930.

d—Deficit.

Effect of Sales Tax on Rate of Return on Owned Capital (as Indicated by Book Value of Stock) of Retailers in Kentucky, Assuming Property and Income in and out of State Proportional to Sales, 1929a

Name	Sales		Invested owned capital		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on invested capital in Ky.	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Great A. & P. Tea Co.	896,719,959	14,134,788	118,770,855	1,876,580	2.8	395,774	261,376	21.09	13.93
Kroger Grocery & Baking Co.	286,611,215	12,635,115	50,549,295	2,229,224	2.07	261,547	142,146	11.73	6.38
S. S. Kresge Co.	155,166,527	3,108,312	83,436,207*	1,668,724	10.86	337,563	313,430	20.23	18.78
F. W. Woolworth Co.	303,047,172	2,422,358	158,804,130*	1,270,433	8.4	203,478	186,204	16.02	14.66
J. C. Penny Co.	209,690,417	2,164,974	66,613,930*	686,123	5.8	125,568	110,868	18.30	16.16
Sears Roebuck & Co.	455,360,619	761,734	241,841,326*	411,130	8.2	62,462	61,172	15.19	14.88
Montgomery Ward & Co.	60,628,672	675,623	174,456,810*	1,936,471	5.4	36,484	35,632	1.88	1.84
W. J. Grant Co.	65,448,298	617,436	20,496,966*	192,671	5.8	35,811	35,191	18.59	18.26
J. J. Newberry Co.	27,789,369	451,279	15,055,500	243,899	6.8	30,667	30,436	12.58	12.48
Walgreen Co.	4,680,305	448,953	16,034,002	1,537,661	7.0	31,427	31,178	2.04	2.03
McCrory Stores Corporation	44,706,253	437,011	23,136,615	226,739	7.1	31,028	30,791	13.68	13.58
Mangels, Inc.	10,600,006	408,084	2,759,723	106,249	2.95	12,038	11,830	11.33	11.13
Melville Shoe Corp.	25,520,675	377,824	7,643,446*	113,123	5.9	22,292	22,103	19.71	19.54
S. H. Kress Co.	18,427,479	370,770	34,785,237	699,183	9.1	33,740	33,555	4.83	4.80
Schulte United	10,363,432	362,040	10,935,271	381,641	6.57d	23,786d	23,967d	6.23d	6.28d
G. C. Murphy Co.	15,726,651	297,544	6,716,749	126,947	6.01	17,882	17,733	14.09	13.97
American News Co.	37,021,107	264,160	16,048,861	113,947	2.67	7,053	6,921	6.19	6.07
Reliable Stores Corp.	14,055,480	248,714	7,803,438	138,121	10.89	27,085	26,961	20.33	19.52
Jewel Tea Co.	16,844,110	207,498	6,231,109*	76,643	9.4	19,505	19,401	25.45	25.31
Edison Brothers Stores, Inc.	3,778,460	204,806	1,440,986	78,101	4.7	9,626	9,524	12.33	12.19

Western Auto Supply Co.	15,959,440	204,658	4,647,657*	59,490	2.32	4,748	4,646	7.98	7.81
Sterchi Brothers Stores, Inc.	7,870,435	200,617	6,476,503	114,151	10.40	20,864	20,764	18.28	18.19
Childs Co.	24,127,725	165,050	14,625,486	99,453	6.1	10,068	19,985	10.12	10.04
Lerner Stores Corp.	19,077,143	125,160	6,191,136*	40,861	6.8	8,511	8,448	20.83	20.67
G. R. Kinney Co.	20,861,960	106,230	7,762,547*	39,589	6.3	6,692	6,639	16.90	16.77
United Cigar Stores Co. of Amer.	69,461,524	89,055	38,215,365*	49,680	6.57d	5,851d	5,896d	11.78d	11.87d
Feltman & Curme Shoe Stores Co.	7,671,195	72,309	1,876,183*	17,636	.50	362	326	2.05	1.85
Schiff Co.	5,364,922	71,474	2,576,889	34,273	5.4	3,860	3,824	11.26	11.16
B. & G. Sandwich Shops, Inc.	3,404,523	65,476	897,427	17,231	8.38	5,487	5,454	31.84	31.65
C. F. Adams Co.	3,180,260	51,626	1,805,826	29,254	2.34d	1,209d	1,234d	4.13d	4.22d
National Bellas Hess Co.	42,448,047	45,573	14,877,102	16,365	.17d	77d	100d	.47d	.61d
Federal Bake Shop of Mo., Inc.	481,260	41,678	973,523*	84,307	8.0	3,334	3,313	3.95	3.93
Ground Gripper Shoes, Inc.	1,148,864	23,935	1,633,603	33,979	9.74	2,331	2,319	6.86	6.82
Nunn Bush Shoe Co., Inc.	2,785,483	21,792	2,396,853	18,695	9.06	1,974	1,963	10.56	10.50

a—Data taken directly from Corporation Report to Stockholders where possible (indicated by *); otherwise from Moody's Investment Manual: Industrials, 1930.

[fol. 617] MARTIN—EXHIBIT No. XV

Average Ratios of Net Earnings to Sales for Variety and Grocery Chain Stores, 1920–1929a

Type of Store	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929
Four variety b	5.0%	6.1%	9.5%	10.1%	9.1%	10.2%	9.8%	10.1%	10.2%	9.0%
Four grocery c	1.4	3.0	4.2	3.9	4.3	3.7	3.7	3.5	3.1	3.1
Three grocery d	1.1	3.1	3.7	3.1	3.5	3.0	2.7	2.8	2.8	2.6

a. Data from H. G. Guthmann and K. E. Miller, "Some Financial Tendencies among Leading Variety and Grocery Chains during the Past Decade", Harvard Business Review, January 1931, p. 251.
b. Including Woolworth, Kresge, Kress, and McCrory.
c. Including A. & P., Kroger, National Tea, and American Stores.
d. Excluding American Stores.

Average Percentages Earned on Net Tangible Investment by Variety and Grocery Chain Stores, 1920–1929a

Type of Store	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929
Four variety b	17.8	19.4	26.5	26.2	22.0	22.6	19.2	20.2	19.1	16.8
Four grocery c	11.4	18.3	25.0	23.7	24.9	20.4	21.3	20.4	17.5	17.4

a. Data from H. G. Guthmann and K. E. Miller, op. cit., p. 249.
b. Including Woolworth, Kresge, Kress, and McCrory.
c. Including A. & P., Kroger, National Tea, and American Stores.

[fol. 618]

MARTIN—EXHIBIT No. XVI

Operating Results of Certain Stores, 1929*

Name of stores	Net sales (1929)	Ratio of operating net to sales	Net earnings	Ratio of earnings to book value stock	Ratio of earnings to book after 1% sales tax (estimated)
1. Bohack	$29,000,000	3.3%	$900,337	10.1%	6.9%
2. American Stores	143,000,000	4.8%	6,594,822	15.2%	11.9%
3. First National Stores	107,000,000	4.9%	4,773,445	24.1%	20.1%
4. Great A. & P	1,053,000,000	2.8%	26,219,631	20.6%	13.2%
5. Kroger Groc. & Bkg. Co	287,000,000	2.1%	5,919,096	11.2%	5.4%
6. National Tea Co	90,210,000	3.4%	2,731,267	12.9%	9.1%
7. Daniel Reeves	33,767,000	3.6%	1,128,349	24.4%	17.6%
8. Safeway Stores	213,413,000	3.2%	6,147,313	14.5%	10.1%
9. Jewel Tea Co	16,844,000	9.3%	1,691,302	26.6%	23.7%
10. Grand Union	37,000,000	2.4%	1,021,385	8.9%	5.2%
11. Pender	15,921,000	1.6%	287,715	12.4%	4.7%
Restaurant Chains:					
1. John R. Thompson	15,742,600	7.9%	1,584,836	10.8%	9.4%
2. Frank G. Shattuck Co	26,442,000	13.2%	3,355,720	13.3%	12.4%
3. Waldorf System	16,362,000	8.5%	1,205,547	19.1%	16.4%
4. Bickford's	5,312,000	9.3%	509,572	15.8%	14.1%
5. *Childs Co*	30,000,000	6.1%	1,277,138	3.7%	3.07%
Variety Chains:					
1. F. & W. Grand Silver	30,400,000	3.8%	1,812,693	14.7%	10.8%
2. W. T. Grant Co	66,000,000	4.9%	3,057,750	14.9%	11.8%
3. S. S. Kresge	156,500,000	10.5%	14,952,210	17.9%	16.1%
4. S. H. Kress & Co	68,500,000	8.1%	5,834,400	16.6%	14.4%
5. McCrory Corporation	44,700,000	7.1%	2,223,234	8.2%	7.05%
6. McLellan Co	23,800,000	4.6%	1,001,457	10.7%	8.3%
7. Neisner Bros., Inc	15,000,000	7.5%	1,025,363	18.4%	15.8%
8. J. J. Newberry Co	28,000,000	6.8%	1,594,247	10.6%	9.01%
9. F. W. Woolworth Co	303,000,000	9.1%	35,664,253	22.4%	19.9%
10. J. C. Penny Co	210,000,000	5.8%	12,413,378	24.8%	20.5%

[fol. 618½]

MARTIN—EXHIBIT No. XVII (Continued)

Operating Results of Certain Stores, 1929*

Name of stores	Net sales (1929)	Ratio of operating net to sales	Net earnings	Ratio of earnings to book value stock	Ratio of earnings to book after 1% sales tax (estimated)
Shoe Chains:					
1. Melville Shoe Corp	$25,500,000	5.9%	$1,594,216	20.6%	17.09%
2. Schiff Co	9,200,000	5.4%	493,623	19.4%	15.7%
3. G. R. Kinney Co	20,900,000	6.3%	859,548	8.4%	7.1%
Drug Chains:					
1. Peoples Drug, Inc	15,500,000	6.0%	893,920	17.1%	14.7%
2. Walgreen Co	47,000,000	7.0%	3,130,466	19.5%	16.6%

* Figures except estimate taken from Moody's Investment Letters (Business and Industries Guide).
#58, September 26, 1930.
#61, October 16, 1930.
#73, December 11, 1930.

[fol. 619] AFFIDAVIT OF CLYDE WILLIAM PHELPS

STATE OF KENTUCKY,

County of Franklin, ss:

Affidavit of Clyde William Phelps in Opposition to Plaintiff's Motion for Interlocutory Decree

Clyde William Phelps, being first duly sworn, says:

I, Clyde William Phelps, a citizen and resident of Chattanooga, Tennessee, state that I am thirty-four years of age and am at present occupying the position of Head of the Department of Economics in the University of Chattanooga, Tennessee, and have held that position since 1925; that my duties in that capacity are to teach public finance, money and banking, economics of corporations and other economic subjects; that I am a graduate of the following institutions of learning: Harvard University with the degree of Bachelor of Arts; the University of Toulouse, France, with the degree of Doctor of Law; studied public finance while at the University of Toulouse, paying some attention to the French Sales Tax; also did some graduate work at Heidelberg University, Germany, and the University of Vienna, Austria.

I was employed by the State of Kentucky in January, 1931, to investigate the cases involving the Kentucky Gross Sales Tax with the view of testifying in said cases for the Commonwealth of Kentucky.

[fol. 620] I have been giving some time to the study of Chapter 149, Acts of the General Assembly of 1930, as it relates to those fields of economics that are commonly designated as Public Finance and Marketing. The following three questions have interested me:

1st. Is that tax based upon ability to pay?

2nd. Is the tax confiscatory?

3rd. Does it fill out the tax system of Kentucky to some desirable degree?

I would like to discuss these questions in order.

First of all, let us turn our attention to the first question, namely: Is the tax based upon ability to pay? There is a reason for being interested in this question for the real

justification of a tax as a revenue measure rests fundamentally on whether or not it taxes according to ability to pay. This means, on the one hand, not taxing beyond ability to pay and, on the other hand, it means that the state must not restrict itself to proportional taxation in all tax measures. Taxing according to ability to pay means taking a larger and larger percentage from the more and more able to pay,—as in the case of progressive or graduated taxes. Examples of progressive or graduated taxes are to be found in the tax systems of foreign countries, in the Federal Income Tax, and in the Wisconsin Corporation and Personal Income Taxes.

Now, ability to pay taxes increases progressively as the size of an establishment (as measured by the volume of sales) increases. It is a well-known principle in the field [fol. 621] of economics that there are important economies in large scale production and large scale operation which bring it about that, in general, the larger the business the more efficient it is (and consequently the greater tax-paying power it has).

This principle is confirmed by the surveys of actual facts in the fields of production and distribution which have been published from time to time. Thus we find in the retail field that in general, as the size of the establishment (as measured by sales) increases, the greater is the percentage of net profit or net gain to sales and the greater is the percentage of net profit or net gain on investment. Exhibits 1, 2, 3, 4 and 5 filed with and made a part of the affidavit of James W. Martin are referred to and made a part of this affidavit as fully as if copied at length herein.

The progressive increase in the ability to pay taxes, as indicated by the aforementioned five exhibits, constitutes a reasonable basis, in my opinion, for a graduated or progressive gross sales tax.

One of the indications of the greater efficiency possessed by large enterprises as compared to small ones is to be found in the comparative rates of turn-over. The facts which have come to my attention show that in general the large retail operators have a higher rate of turn-over than the small operators. Exhibits 6 and 7 filed and made a part of the affidavit of James W. Martin are hereby referred to and made a part hereof as fully as if copied at length herein.

[fol. 622] An example of the efficiency of the large enterprises over the small in quicker transfer of merchandise from the factory to the consumer is given in the following paragraph from an address delivered before the Sixth Annual Conference of Major Industries at Mandel Hall, University of Chicago, October 23, 1929 (published in Chain Store Progress, Volume 1, No. 9), by E. C. Sams, President of the J. C. Penney Company:

"To illustrate, the Harvard Bureau of Research has found that the individual dry goods store requires 281 days on the average to bring merchandise from the factory via the wholesalers and the store to the customer. All that time either borrowed money or the consumer's money is used. Interest to cover all this time is tremendous in amount. Contrast this with the experience of the chain store system that takes only 85 days on the average to bring the same character of merchandise from the factory direct to the consumer. Our chain store system, for example, had an average inventory through the year of 1928 of $44,127,941.00. Interest at six per cent on that amount for 85 days was $623,333.00. That is the amount our chain must charge the consumer. Based upon the same inventory in the average individual stores, examined by the Harvard Bureau of Research, interest must be charged their consumers for 281 days, or a total interest charge of $925,796.00 for the same inventory."

A student of public finance and of the general field of economics is necessarily led to conclude from his studies that if retailers are to be taxed according to their ability [fol. 623] to pay (which is a sound canon of public finance), the larger enterprises, which are generally the more efficient, must be taxed at higher rates than the smaller are taxed. This is what the Kentucky Law does.

Since the facts which have been collected upon efficiency (and thus tax paying ability) show that efficiency or ability increases stage by stage as size of business increases, it appears that a progressive or graduated tax, with numerous brackets (such as the Kentucky Retail Gross Sales Tax), reasonably endeavors to adjust the rate of taxation to increasing ability to pay.

The petitions submitted by the Kroger Grocery & Baking Company, the J. C. Penney Company and others make

it appear that the Kentucky tax progresses in a jumpy, arbitrary and very sharp manner. This is not so. A study of the progression of the tax as it would work in actual practice (as shown in Prof. Walradt's affidavit) demonstrates that the effective rate progresses in an even and reasonable manner.

Before leaving this first question, it is interesting to ask whether or not independents who are uniting in voluntary associations are able to attain the economies of large scale operation to the same extent as large consolidated enterprises. In theory it would seem, from a superficial examination, that a large number of co-operating independents might secure any and all of the valuable advantages pos- [fol. 624] sessed by the large consolidated enterprises. The facts, however, do not confirm such a theory.

Prof. E. Z. Palmer's survey of the prices of independent grocery stores and chain grocery stores (the chains representing large scale consolidated enterprises) in Lexington, Kentucky, during the month of March, 1930, showed that the chains in that city were 14.3% below the independents. Furthermore, the survey shows that the four most efficient independents were being undersold 6.3% to 9.2% by the average chain.

These four most efficient independents were even being undersold three to four per cent by the least efficient chain in the city. Voluntary co-operation of independents evidently did not enable a single independent to meet the competition of even the most inefficient chain in Lexington, Kentucky. The survey of Professor E. Z. Palmer, just referred to, was published in Chain Store Progress, Volume 2, Number 9.

In "A Study of the Prices of Chain and Independent Grocers in Chicago," by Bjorklund and J. L. Palmer, published by the University of Chicago November, 1930, pages 37 and 38, we find that the so-called voluntary chain or voluntary co-operative group of independent grocers was being undersold 5.04 cents on the dollar by the chains. Professors Bjorklund and Palmer state: "It is significant to note, however, that they (the voluntary associated grocers) were not experiencing as much success in meeting chain prices as were certain entirely independent merchants."

[fol. 625] The big advantage of the regular chain over the voluntary group of independents, which prevents the latter from achieving the ability and efficiency of the former, is to be found in the fact that the regular chain enjoys the efficiency which comes from a military organization in which the ideas, policies, and orders of the management are certain to be carried out promptly, harmoniously, and efficiently by the many units or branches. The voluntary group of small retailers is handicapped by its democratic organization. It is a case of the proverbial efficiency of the military organization or the autocratic government as compared to the proverbial inefficiency of democracy.

Voluntary co-operation of small retailers in brief does not appear to increase the ability of these smaller retailers so as to place them in the ability class represented by the large scale consolidated enterprises.

The second question which has interested me is whether or not the tax is confiscatory in its higher brackets. I do not think that a 1% tax, such as is levied upon sales in excess of $1,000,000.00 is confiscatory. This opinion comes from a study of the present returns upon property and on investment of various large scale enterprises operating in the State of Kentucky and the returns on the investment and the property of these companies after payment of the Kentucky tax. The pertinent figures are set forth in Exhibits Nos. 13 and 14 in the affidavit of J. W. Martin, [fol. 626] which exhibits are incorporated herein and made a part hereof as fully as if copied in full herein.

From these exhibits, it is evident that the per cent earned on property and also the per cent earned on invested capital of large-scale operators in Kentucky would not be reduced in general very much, and certainly the reduction would constitute a far cry from confiscation.

The third question of interest in this Kentucky tax is whether or not it tends to fill out the present tax system, remedying some of the present defects of that system. In judging a tax, one must always consider the place of that tax in the tax system. In other words, a tax system in the nature of one single tax would not be desirable. Therefore, in the modern tax system, we have many kinds of taxes which tend to supplement one another. In the

Kentucky tax system, it appears that the retail gross sales tax is a desirable addition to previous taxes in that it tends toward equalization of the tax burden imposed upon retail merchants enjoying different volumes of sales. Without the retail gross sales tax, we find (as shown by Exhibits 9, 10 and 11 of J. W. Martin's affidavit, which exhibits are incorporated herein and made part hereof as fully as if copied in full herein) that enterprises with a large volume of business are actually paying in taxes an amount which represents a very much smaller percentage of their sales than the amount actually being paid by retailers [fol. 627] doing a small volume of business. Exhibit 9 shows the situation in Louisville, Kentucky, and Exhibits 10 and 11 show the situation for the country as a whole in regard to department stores.

Thus it seems that, without the retail gross sales tax, the small retailers of Kentucky would be discriminated against. (Exhibit 9 shows, for example, that in Louisville, Kentucky, in 1928, the ratio of taxes to sales of grocery stores doing a business of less than $5,000.00 was over six times as large as the ratio of taxes to sales of grocery enterprises doing over $100,000.00. The retail gross sales tax tends to remedy this situation.

Clyde William Phelps.

STATE OF KENTUCKY,
County of Franklin, set:

On this the 14th day of February, 1931, personally appeared before me Clyde William Phelps, who signed the foregoing affidavit in my presence and made oath to the truth of the statements therein contained.

B. T. Brewer, Notary Public, Franklin Co., Ky.
My commission expires on the 9 day of Aug., 1931.
(Seal of B. T Brewer, Notary Public, Franklin Co., Ky.)

[Title omitted]

[fols. 628 & 629] AFFIDAVIT OF B. T. BREWER IN OPPOSITION TO PLAINTIFF'S MOTION FOR INTERLOCUTORY DECREE

The affiant, B. T. Brewer, first being duly sworn states that his name is B. T. Brewer; that he is thirty-seven years

of age; that he resides at Frankfort, Kentucky; that he is Secretary of the State Board of Charities and Corrections [fol. 630] of the Commonwealth of Kentucky, to which position he was appointed upon the creation of the Board upon March 9, 1920, and which position he has held continuously since that date; that as Secretary of the said State Board of Charities and Corrections he is custodian of its records; and is familiar with the conditions existing at the institutions under its control.

He states that the Kentucky State Reformatory, located at Frankfort, Kentucky, is the penal institution serving that part of Kentucky located east of a line drawn roughly north and south from Louisville, Kentucky; that said institution was established about the year 1797, and that certain of the first buildings constructed at that institution are still in daily use for the housing of prisoners; that there has been no new construction of a material nature at the institution to increase its capacity for many years, and that its present normal capacity is 1,600. He further states that the daily average population at this institution for the fiscal year ending June 30, 1930, was 2,211; that the population on January 31, 1931, was 2,354, and that the population of the institution has doubled within the past ten years with practically no increases in accommodations for prisoners; that because of the increase in population in excess of the capacity of the institution it is necessary to confine two prisoners in one cell; that the cell blocks are of old type construction; the cells are not equipped with any modern sanitary conveniences; and that no cells have running water or toilet accommodations. He further states that recently in several instances it has been necessary for the authorities in charge of the Kentucky State Reformatory to request Court officials to hold convicted and sentenced men in the several county jails of the State until a sufficient number of prisoners could be discharged at the expiration of their sentences or released upon parole to allow the admission of new commitments. He states that [fol. 631] immediate relief from these conditions is imperative in order to provide accommodations for prisoners sentenced by the Courts of the State and to provide sanitary and liveable conditions for the inmates of the institution. He states that the State Board of Charities and

Corrections has planned to remedy these conditions and to provide more adequate and sanitary accommodations from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He states that the Kentucky State Penitentiary, located at Eddyville, Kentucky, is the penal institution serving that part of Kentucky lying west of a line drawn roughly north and south of Louisville, Kentucky; that said institution was constructed about 1890; and that there has been no new construction of a material nature at this institution to increase its capacity for many years; that the present normal capacity of said institution is 600. He further states that the daily average population at this institution for the fiscal year ending June 30, 1930, was 1,018, that the population on January 31, 1931, was 1,099, and that the population has practically trebled within the past ten years. He further states that the cells at this institution are of old type construction, containing no running water, toilets or other sanitary conveniences. He further states that it is necessary at this institution to sleep prisoners upon cots, one touching the other, located in rows, in the corridors of the cell houses. He states that immediate relief from these conditions is imperative in order to provide accommodations for prisoners sentenced by the Courts of the State and to provide sanitary and liveable conditions [fol. 632] for the inmates of the institution. He states that the State Board of Charities and Corrections has planned to relieve these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He further states that the Kentucky Institution for the Feeble-Minded, located at Frankfort, Kentucky, is the State Institution for the care and custody of the feeble-minded, and that said institution was established about the year

1860. He states that the present capacity of this institution is approximately 500; that the average population of the institution for the fiscal year ending June 30, 1930, was 545; and that the population on January 31, 1931, was 635. He states that there are hundreds of feeble-minded persons in the State of Kentucky who should be confined in this institution, and who are entitled to the care and protection of the State, and that the public at large is entitled to protection from these feeble-minded persons upon whom no restraint is exercised, and who are permitted to go at large begetting their kind to become future charges upon the State of Kentucky. He further states that these hundreds of feeble-minded persons cannot be admitted because of lack of room; that the doors of this institution are closed, and have been closed for many years, to new admissions and that new inmates can only be admitted upon the death or discharge of one of the present inmates. He states that there are many Court Orders of admission on file at the institution at the present time for persons who have been properly committed by the Courts but who cannot be accepted because of lack of room. He further states there is no hospital for the care of the sick at this institution and [fol. 633] that it is necessary to confine those inmates who are sick in a portion of a dormitory where other inmates sleep; and that there is no provision for the isolation of inmates who are ill of a contagious or infectious disease. He states that immediate relief from these conditions is imperative, and that the State Board of Charities and Corrections has planned to remedy them from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He states that the Kentucky State Houses of Reform, located at Greendale, Kentucky, is the State institution for juvenile delinquents; and that said institution was constructed about the year 1893. He states there has been no construction of a material nature for the purpose of increasing the capacity of this institution for many years. He states that the present capacity of the institution is 350 and that the average population for the fiscal year ending

June 30, 1930, was 678. He states that the population on December 31, 1930, was 669. He states that because of these conditions it is necessary to crowd inmates of all ages, and offenders of all descriptions into the same dormitories without any degree of segregation or classification, the youngest children with the older ones, and those convicted of minor offenses with those who have been convicted on charges of the most serious nature. He states that the institutions for boys and girls are both located upon the same ground; and that there are no adequate facilities or buildings for the education and proper vocational training of these inmates; that there is no Chapel of sufficient size for their religious and moral training; [fol. 634] no assembly hall; and no gymnasium or building for necessary physical training during the winter months. He states there are no adequate hospital facilities for the boys, and that there are no accommodations of any character for inmates who are tubercular; nor are there any adequate facilities for the isolation of the venereally diseased. He states that the State Board of Charities and Corrections has planned to remedy these deplorable conditions from the moneys which it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time.

He states that there are three State hospitals for the insane in Kentucky; the Central State Hospital at Lakeland, Kentucky, erected about 1870; the Eastern State Hospital at Lexington, Kentucky, erected at about 1820; and the Western State Hospital at Hopkinsville, Kentucky, established about 1840. He states that there has been no material construction at these institutions for the purpose of increasing their capacity in many years. He states the present capacity of the Central State Hospital at Lakeland, Kentucky, is 1,650; that the average population for the fiscal year ending June 30, 1930, was 2,058, and that the population on December 31, 1930, was 2,177. He states the present capacity of the Eastern State Hospital at Lexington is 1,250; that the average population for the fiscal year ending June 30, 1930, was 1,499; that the population

on December 30, 1930, was 1,618; and that the original building constructed at this institution about 1820 is still standing and in daily use. He states that the capacity of the Western State Hospital at Hopkinsville is 1,500; that the average population for the fiscal year ending June 30, 1930, was 1,677 and that the population on January 31, [fol. 635] 1931, was 1,691. He states that each of these institutions is crowded beyond its capacity to an extent where proper medical care and treatment cannot be afforded the patients; that the expedient has been considered from time to time of closing the doors of these institutions to further admissions; that not one of these institutions is equipped with a modern infirmary; nor with a Receiving or Detention Building in which new admissions can be confined for observation; that not one is equipped with hydrotherapeutic or other modern methods of treatment; that because of their type of construction both the Eastern and Western State Hospitals have been repeatedly described as fire traps by Grand Juries and by persons familiar with modern fire prevention methods; that neither the Eastern nor the Western State Hospitals is protected with automatic sprinkling systems. He states that immediate relief from these conditions is imperative in order to provide necessary accommodations and treatment for the helpless inmates of these institutions; and that the State Board of Charities and Corrections has planned to remedy these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at these institutions.

He further states that in Kentucky there is no institution or hospital for the care and treatment of epileptics and that it is necessary to confine this class of persons with the insane and feeble-minded, indiscriminately, and without regard to their proper treatment and care. He states that at the present time there are approximately 600 epileptics confined in the three State Hospitals for the Insane and at the Institution for the Feeble-Minded. He states [fol. 636] it is the plan of the State Board of Charities and Corrections to establish an institution or colony for

the epileptics of this State where they can be properly supervised and cared for, and to provide for them methods of treatment. He states it is the purpose of the Board to establish such an institution from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained for this purpose.

He further states that neither the Kentucky State Reformatory at Frankfort nor the State Penitentiary at Eddyville owns any land which can be cultivated for the purpose of providing food for the inmates of the institutions and labor for the prisoners confined therein. He states that for the first six months of the fiscal year ending June 30, 1930, there was a daily average of 1,058 idle prisoners at the Kentucky State Reformatory at Frankfort and a daily average of 138 idle prisoners at the Kentucky State Penitentiary at Eddyville; and that this large number of idle prisoners is due to a population in excess of that for which work can be provided within the confines of the institutions as they exist today; and to the general business depression which has resulted in curtailment of production in the factories located within the prison walls. He states that it is the plan of the Board of Charities and Corrections to purchase, from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly, a large farm upon which unemployed prisoners can be put to work for the purpose of producing food for the penal and other institutions of the State, and to erect thereon, at the proper time, a modern reformatory in which can be housed prisoners convicted [fol. 637] of minor felonies. He states there is no other fund or appropriation from which the necessary money can be obtained for this purpose.

Affiant further states that there is no Women's Prison or Reformatory in Kentucky, and that women who are convicted of felonies are confined in a separate department of the Kentucky State Reformatory at Frankfort on a small V-shaped tract of ground, upon which the cell house for women is located, but that the proximity of the men's section renders discipline difficult and conditions unsatisfac-

tory. He states that the cell block in the Women's Department is of old type construction, and that the cells contain no sanitary conveniences; neither do they contain toilets or running water. He states that because of the limited capacity of the Women's Department, it is necessary to confine two women in one cell; and that in some instances it has been necessary to provide beds for women prisoners on the cell block walks, placing the mattresses and bed clothing on the floor of the walk and removing them each morning before the inmates in the cells can leave the cells. He states that the Women's Department, because of its crowded condition, is a serious fire hazard to the entire institution. He states that the State Board of Charities and Corrections has planned to remedy these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly..

He further states that the increase in population at the seven institutions under the control of the State Board of Charities and Corrections is unprecedented, and that the institutions now house the largest number of inmates in the history of the State; but that the increase in population has been reflected over a period of ten years at an increasing yearly rate, and that there is no immediate prospect [fol. 638] of any relief from the growing number of commitments. He submits that the average populations of these institutions by years, beginning with the fiscal year ending June 30, 1921, has been as follows:

Year ending June 30	Average population
1921	6,762
1922	6,998
1923	7,570
1924	7,560
1925	7,877
1926	8,086
1927	8,208
1928	8,351
1929	9,106
1930	9,530
*1931	10,194

* First six months.

Affiant further states that architects have been employed by the State Board of Charities and Corrections who have drawn plans for the enlargement and improvement of buildings and the construction of new buildings for the purpose of relieving the present existing conditions, but the State Board of Charities and Corrections has been prevented from putting said plans into effect because of litigation which has been commenced affecting the validity of the so-called Gross Sales Tax Bill, enacted by the 1930 Session of the General Assembly, from the proceeds of which it was planned and contemplated to make the improvements which are necessary.

[fol. 639] Further, the affiant saith not.

STATE OF KENTUCKY,
County of Franklin, Set.:

On this the 13th day of February, 1931, personally appeared before me, B. T. Brewer, who signed the foregoing affidavit in my presence and made oath to the truth of the statements therein contained.

—— ——, Notary Public, —— Co., Ky. My Commission expires on the — day of ——, 193–.

[fol. 640] [Title omitted]

NARRATIVE OF TESTIMONY OF WALTER BURR GIVEN BEFORE ALMA RHEAD FEBRUARY 7, 1931

WALTER BURR testified as follows:

That he has been professor of Rural Sociology in the University of Missouri since September 1, 1929. That he has been a graduate of Kansas State Agricultural College and of the University of Missouri. That prior to teaching he was connected with the Department of Agriculture in the capacity of Rural Organization Specialist and from time to time during the eight years he has acted as teacher, he conducted research projects for the Department of Agriculture, these research projects including the study of farm families receiving poor relief from County funds. That he is the author of magazine articles and three books, the books being "Rural Organization", "Small Towns and Estimate of Their Trade and Culture", and "Community

Leadership". That he has made a special study of rural trade and has been frequently called in as an advisor in Kansas and Missouri and in surrounding States in regard to problems of community organizations. That he is familiar with the transition which has taken place in the methods of distribution of goods and wares, a phase of which change is found in the introduction of store dis- [fol. 641] tributing centers in communities that are controlled from outside the community. That this change is known as the "chain store system", which system undertakes through organized efficiency methods to distribute commodities to the public as distinguished from the retail store owned and managed by a local individual. That the multiple owned store companies attempt through efficiency methods to get the goods to the consumer at the lowest possible price. That these multiple owned store companies come into competition with the individual who has performed other functions in the community in addition to engaging in the merchandise business as coincident with the fact of his permanency, his residence, and his leadership as a business man in the community. That community life developed in the past to a considerable extent on the "mutual aid system". That the merchant group have borne to a considerable extent the responsibility of the conservation and development of community resources including civic and social resources such as relieving distress of an economic nature in the community, looking after the interests of the school beyond that which is looked after by the responsible leaders and paid out of taxation, the general cooperation and looking after problem people in the community, the support of the churches and the conducting of civic movements. That the individual merchants have borne the major part of the cost in time, money and service in order to keep the good will of the people and to be successful. That as a result of the introduction of the change in the method of distribution the burden carried by the individual merchant is falling upon the State and being met by taxation as for example, the relief of poverty in the health situation which is now coming to be considered as "health prevention". That the County health unit is being introduced, supported partially by the State in matters of vocational training where here-

tofore they were on an apprenticeship basis and are now being introduced in high schools under support of federal [fol. 642] funds under the "Smith-Hughes Act". That the tendency for communities under the less personal system is to be more ready to send their problem people such as insane, feeble-minded, epileptic, and criminal to State institutions rather than to look after them in the community thereby imposing an added burden upon the State, which must be met from the tax funds. That the multiple owned stores are not bearing locally the burden which heretofore was borne by the individual store owner for the reason that the manager of the multiple owned store is likely to be temporary in the community. That transient persons do not get under the civil, social burdens of the community in which they go into. That they devote their time and attention to reach the objective in distributing food at the lowest possible cost and for this reason cannot devote any time for community enterprises. That the managers of the multiple owned stores do not have the power of decision in expending funds of the company for such purposes.

That the service which was rendered and is being rendered by the individual store owner had a decided value in money to the State both from an economic standpoint in that the problems of such are handled in their origin in a local community and therefore do not become an expense to the State, and also from a social standpoint in increasing the high standards of living and culture thereby creating more progressive and prosperous citizens. That the service rendered by the individual merchant can be reckoned in dollars and cents and is necessarily an expense against his business.

That individual merchants do not sell their goods at the same price as chain stores and that the service rendered by the individual merchant is a factor in this price difference. That insanity, feeble-mindedness, and epilepsy are not actually increasing but that the number of reported cases is larger due to increase in registration.

[fol. 643] Cross-examination:

That he graduated from the University of Kansas in 1920 and that prior thereto he was in settlement work in

Chicago, Juvenile Court work in Kansas City, and settlement work in San Francisco. That all his work in these three cities was work done in large industrial centers. That during the years 1914 to 1920 he travelled about the State of Kansas dealing with community problems of various kinds, town-country relations and conflicts, rural High School developments, consolidation of schools and formation of cooperative associations. That he has had no business experience of any kind.

That he has never lived in or been in Kentucky except to pass through. That he has never made any study of business or retail distribution in the State of Kentucky. That he would define a chain as a system of retail distribution so organized that instead of the business being conducted through one store it is conducted through two or more stores.

That in certain places where the owners of the multiple system, lives and has some of his stores, those particular stores may be said to be home-owned even though they are a part of a chain store system and that some chain stores are home-owned and some are not.

That the change in the trend of rural life has been going on for a great number of years and was so marked that when Roosevelt was President he appointed the "Country Life Commission" to make an investigation. That chain store systems have extended their operation very rapidly in the last few years but that The Great Atlantic & Pacific Tea Company had a great number of stores in 1900. That since the war there has been a development in manufacturing which is characterized by the expression "massed pro-
[fol. 644] duction" which has necessitated mass distribution. That he is not opposed to the chain store system. That he is not opposed to the sending of problem cases to institutions. That we are changing from the dependence upon the individual ownership to dependence upon the State. That coincident in point of time with the growth of the multiple outlet stores there has been a slowing up in the rate of the movement of population from rural areas to urban areas. That individual owned stores are copying such efficiency methods from the multiple owned store operators as they can introduce into their system. That he would not in the long run advocate the retention in our

economic system of any waste or inefficiency in the distribution of merchandise.

That he has had no practical experience in the collection of taxes or in working for any tax body. That he has made a wide study of taxes in order to give advice to rural communities.

That both the individual store owner and the chain store operator purchase their merchandise very largely outside of the community. That there is no difference which can be based upon the fact that one sends in its stock of merchandise and the other orders it in. That the local merchant does purchase certain of his product from surrounding farm areas. That generally speaking, the chain store has developed sales efficiency methods that enable it to undersell the average individual local merchant. That the economic and efficient distribution of food has a value and benefit to the community to the extent that it does not in the long run break down community civic, educational, social and religious organizations.

That efficiency does not necessarily depend in any sense upon whether a man owns one or two stores.

[fol. 645] That he is familiar with the development of cooperative or voluntary chains in the United States especially with Independent Grocers' Alliance. That that organization has approximately ten thousand cooperative stores. That all those stores have distinctive and uniform store fronts bearing I. G. A. labels. That the interior arrangements of these stores are substantially similar and that they use the same color in all ten thousand stores. That they have some peculiar I. G. A. brands. That the ten thousand stores purchase, advertise and distribute cooperatively. That they are advised by men from the central headquarters and that membership in these co-operative stores is open to every individual grocery store. That members of the co-operative or voluntary chain are considered individual home-owned stores. That the difference between the multiple outlet stores and individual stores in regard to buying power does not depend upon the ownership of two or more stores but upon the volume of business. That his chief point in regard to the change from individual home-owned stores to chain store operations is that the individual store owner performs certain

civic functions and that the individual store owner is being supplanted by another system which other system must bear the burdens of individual store owners. That all differences with relation to distribution price and purchasing power have been met by the cooperative or voluntary chain except the difference in regard to civic interest. That there is a variation among individual store owners in regard to whether they are charitable or not. That there is a variation among individual store owner- as to their liberality and that there is a variation among men as to their ability to lead the public. That some individual merchants in small towns support churches and some do not. That some individual merchants support the public schools [fol. 646] and some do not. That he is familiar with instances where managers of J. C. Penny stores have contributed to charitable civic, philanthropic, church, and educational movements as liberally as the corresponding competitive merchant. That he would not make any statement that the chain store managers as a whole are uncharitable and lack leadership or interest and do not live in or care about the community. That he knows of no study undertaken to determine how many chain store managers own their own homes in the towns in which they live. That he has no statistics in regard to contributions made by store managers regardless of the ownership of the stores in the State of Kentucky to charitable, philanthropic or civic enterprises. That he has made no study of the part taken in civil affairs by store managers in the State of Kentucky regardless of the ownership of the stores. That he has made no study and has no facts within his personal knowledge as to whether or not managers of stores regardless of ownership, frequently move from the community where the store is located. That he has no knowledge as to whether managers of stores operated by J. C. Penny in the State of Kentucky have power to spend company funds for philanthropic purposes. That there has been an increase in the rate of committments to asylums from big cities as well as from small towns and rural communities. That he does not advocate the taking care in the private home of those who require custodial care. That he does not accuse the chain stores or multiple outlet stores of causing insanity or epilepsy.

That lower prices resulting from economic efficiency and sales increases the purchasing power of the consumer's dollar, and that practically every item that is a member of rural community purchase, including all necessities of life, is distributed through multiple outlet stores.

[fol. 647] That in a town of approximately 2500 there would be about 600 families and about 20 to 40 retail stores serving such a community. That the average family would purchase from these stores approximately $900.00 worth of goods per year. That he has no idea what the average contribution of the individual home-owned store proprietor would be in a town of approximately 2500 inhabitants. That in such a town of 2500 inhabitants and 600 families with an average purchase of $900.00 per family, the total purchases would amount to $540,000.00 per year and assuming that efficiency results in a ten per cent saving, there would be a total saving to the community of $54,000.00. That if the saving was only five per cent the total sum saved the community would be $27,000.00.

That in a town of 5000 inhabitants there would be about 1000 families and that upon the same assumption as to purchases and savings due to efficient distribution of merchandise there would be a saving of $90,000.00 or a saving of $45,000.00 if the efficient distribution of merchandise resulted in a five per cent savings.

Redirect examination:

That taking the individual store owner as a class and those who operate multiple outlet stores in various communities, the burden of social service has fallen on the individual merchant owning and managing a store in the small town. That the burden is in the process of shifting and that part of it is still being borne by the individual store operator. That even if one assumed that chain store operation resulted in a saving to the community of some $54,000.00, it does not necessarily follow that the community would be that much better off at the end of the year than if it had made those purchases from the individual store owner. That he has never heard of either The Great [fols. 648-661] Atlantic & Pacific Tea Company or The Kroger Grocery & Baking Company ever donating any hospitals or old homes to the community in which they do

business. That the time and energy expended by the individual local merchant is the greatest contribution to the community. That he found it more profitable in his experience in advising communities in regard to their social problems to call on the individual merchants rather than the chain store managers. That he had received material response from chain store merchants in money but not in time. That he does not favor penalizing the multiple outlet store for subsidizing the home-owned store.

Recross-examination:

That he has discussed the general situation in regard to the matter in question with the Attorney General of Kentucky before he testifid but that no discussion was entered into as to the testimony. That he has studied the briefs in the case and that he was invited to come to testify by the Attorney General. That he was promised a reasonable fee for appearing as an expert witness.

It is agreed by and between counsel for the plaintiff and counsel for defendant that the foregoing is a correct narrative statement of the testimony contained in the deposition of Walter Burr taken before Alma Rhead, a Notary Public, on February 11, 1931 in Cincinnati, Ohio and introduced in evidence in the above entitled cause, and it is further agreed that this narrative form may be used as part of the record in the appeal to the Supreme Court of the United States as a substitute for the deposition introduced in the Three-Judge Court.

—— ——, Attorney for Plaintiff. S. H. Brown, Attorney for Defendant.

[fol. 662] In Supreme Court of the United States

Statement of Points to be Relied Upon—Filed April 9, 1932

Comes now the Appellant in the above entitled cause and states that the points upon which it intends to rely in this

Court in this case, are that the United States District Court for the Eastern District of Kentucky erred in the rendition of its interlocutory decree denying plaintiff's motion for an interlocutory injunction in the following particulars set forth under the heading "A" and also erred in the rendition of its final decree sustaining the motion of defendants to dismiss the Bill and thereupon dismissing plaintiff's Bill of Complaint in the following particulars set forth under the heading "B";

"A"

Point 1. In holding that Appellant has any plain, adequate, complete or certain remedy at law available to it in the Federal Courts either under the Challenged Act (Chapter 149, Session Acts of 1930) or any other provision of Kentucky law or otherwise (Assignments of Error 1, 2, 3).

[fol. 663] Point 2. In holding that the Challenged Act authorizes any action at law against the Commonwealth of Kentucky to recover a money judgment in any Court or that by said act or any other provision of law the Commonwealth of Kentucky has waived its immunity under the Eleventh Amendment to the Constitution of the United States from suit against itself or its representative in any Court of the United States (Assignments of Error 4, 5, 6, 7, 8).

Point 3. In holding that the Federal Courts have jurisdiction of any remedy under Section 10 of the Challenged Act by way of mandamus or otherwise to compel the Auditor of Public Accounts to draw his warrant upon the Treasurer of the Commonwealth of Kentucky for the refund of any illegal tax exacted under said act with interest thereon (Assignment of Error 9).

Point 4. In holding that under the facts set forth in the Bill and shown by the evidence, the remedy provided under Section 10 of the Challenged Act to-wit: the refund of illegal taxes by the issue of a warrant restricted by said act to payment out of the general fund of the Commonwealth of Kentucky without other provision for the payment of said warrant and without priority as to other out-

standing warrants previously issued against said fund and without provision for interest thereon at the legal rate, affords the tax payer a complete, adequate, prompt, and certain remedy at law (Assignments of Error 10, 11, 12, 13, 14, 15, 16, 17).

Point 5. In holding that there was no jurisdiction of this suit as a class suit pursuant to Equity Rule No. 38 and the order of the Court made at its inception in order to prevent a multiplicity of actions involved in the claims asserted by plaintiff on its own behalf and on behalf of other retail mechants similarly situated and to prevent a multi- [fol. 664] plicity of actions to recover successive payments of taxes in successive years (Assignments of Error 18, 19, 20).

Point 6. In holding that no basis for relief in equity is afforded by virtue of the drastic penalties provided in Sections 5 and 7 of the Challenged Act. (Assignment of Error 21.)

"B"

Point 7. In refusing to grant an interlocutory injunction to preserve the status of the parties until this cause could be fully heard and finally decided upon its merits (Assignment of Error II-1).

Point 8. In declining to consider the issue or the question and in therefore failing to hold that the Challenged Act designedly denies to plaintiff and to other retail merchants similarly situated the equal protection of the laws for the reasons specifically set forth in Assignment of Error II from two to six inclusive (Assignment- of Error II-2, 3, 4, 5, 6).

Point 9. In declining to consider the issue or question and in therefore failing to hold that the Challenged Act by reason of its classifications, exemptions, credits, disproportionate and widely varying rates of taxation arbitrarily and unreasonable discriminates against the plaintiff and other retail merchants to such an extent that the plaintiff is required to pay twice as much tax on thirteen million dollars of sales as sixteen thousand merchants similarly situated are required to pay upon two hundred and sixty million dollars in sales. (Assignment- of Error II, 2, 3, 4, 5 and 6.)

Point 10. In declining to consider the issue of question and in therefore failing to hold that the Challenged Act is unconstitutional and void under the Constitution of the Commonwealth of Kentucky in that said act violates the principles of uniformity in the matter — persons or prop-
[fols. 665 & 666] erty upon a reasonable basis of classification such as is required by the Constitution of Kentucky (Assignment of Error II-7).

Point 11. In declining to consider and in failing to hold that the tax levied by the Challenged Act is confiscatory and deprives the plaintiff of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States (Assignment of Error II-9).

Point 12. In declining to consider and in failing to hold that the Challenged Act is a burden on interstate commerce and discriminates against products of States other than Kentucky by imposing a tax on the sale of products moving in interstate commerce and on the sale of farm products grown outside of Kentucky while exempting similar products raised in Kentucky (Assignment- of Error II-10 and 11).

The Kroger Grocery & Baking Company, Appellant,
by Robert S. Marx, Frank E. Wood, Harry Kasfir,
Cincinnati, O.; John C. Doolan, James W. Stites,
Louisville, Ky.

April —, 1932.

Service of a copy of the above list of points to be relied upon by Appellant in the Supreme Court of the United States of America is hereby accepted and acknowledged on behalf of the several defendants and Appellees mentioned hereinabove.

John B. Lewis, Selden R. Glenn, and Henry M. Cline,
Individually and as Members of the State Tax
Commission of the Commonwealth of Kentucky,
and J. Dan Talbott, Individually and as Auditor
of Public Accounts of the Commonwealth of Ken-
tucky, by Bailey P. Wootton, Atty. Gen.; F. H.
Brown, Asst. Atty. Gen.; H. W. Batson, J. W.
Welch, Leslie W. Morris, Solicitors.

[fol. 667] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF PORTION OF RECORD TO BE PRINTED BY CLERK.

Comes now the Appellant in the above entitled case and states that in its opinion the following portions of the record as filed, are necessary for consideration of the case and need to be printed by the Clerk for the hearing thereof.

1. Bill of Complaint.
2. Application for interlocutory injunction.
3. Motion for temporary restraining order.
4. Order convening three-Judge Court.
5. Temporary restraining order.
6. Order authorizing plaintiff to sue as representative of a class.
7. Entry continuing temporary restraining order in force until hearing.
8. Motion of defendants to dismiss plaintiff's Bill of Complaint.
9. Answer of defendants.
10. Reply of the plaintiff.
11. Order of submission filed February 14, 1931.

[fol. 668] 12. Order listing parties protected by restraining order filed March 28, 1931.

13. Letter of James Martin and A. H. Brendel in regard to gross sales tax report analysis and analysis.

14. Affidavits of the following persons read in support of the application for an interlocutory injunction and the exhibits attached to said affidavits: Arch B. Davis, Robert W. Lyons, John B. Bonham, W. A. Steiden, Gilbert J. Schneider, D. T. Petty, Albert B. Berger, John E. Donahue, John Scanlan, Chris Schumann, Louie J. Jones, Brack M. Ferrill, Albert C. Huneke, Walter Wenderoth, Francis Ballard, Rufus Blume, O. W. Vaughn, John C. Schwartz, Ernest Thompson, M. R. Anderson, C. J. Henry, Harmon [fol. 669] Noe, R. W. Owens, Crawford Lee, C. H. Parker, Robert J. McKim, Fred Levy, Dann Byck, C. B. Turley, Milton Marx, Daniel M. Cohen, H. C. Amstutz, Dolph Wile, Paul H. Nystrom, James R. Karibo, N. A. Bash.

15. Print name of affiants listed hereunder and their connection with J. C. Penney Co. and their residence. Omit printing body of their testimony with explanation that same is omitted in printing for reason that it is similar

in substance and form except as to location name and amounts for the territory in which the affiants reside to the affidavit of H. C. Amstutz for Paducah Kentucky which affidavit is printed in full.

C. H. Parsons, L. M. Ross, C. R. Leininger, E. R. Probasco, B. E. Van Antwerp, W. G. Howell, E. C. Purvis, M. S. Gesley, A. C. Miller, O. A. Rhodes, W. T. Morgan, [fol. 670] W. G. Jenkins, Robert Wright, H. H. Craven, T. B. Jones, P. O. Wolverton, C. W. Gowin, B. E. Willis, J. D. Delano, J. A. Gude, B. A. Aistrop.

16. Narrative of testimony of Shirley E. Haas.

17. All the testimony offered or read on behalf of defendants-appellees as set out in the præcipe (stipulation) filed with the Clerk of the Court below.

18. Opinion of the Court.

19. Order and decree denying interlocutory injunction and dismissing Bill of Complaint.

20. Order substituting J. Dan Talbott as party defendant.

21. Petition for Appeal.

22. Assignment of Error.

23. Order allowing appeal.

24. Stipulation of counsel as to what shall constitute record.

The Kroger Grocery & Baking Company, Appellant, by Robert S. Marx, Frank E. Wood, Harry Kasfir, Cincinnati, O.; John C. Doolan, James W. Stites, Louisville, Ky., Solicitors.

[fols. 671 & 672] April 7, 1932.

Service of a copy of the above statement of portion of record to be printed by Clerk is hereby accepted and acknowledged on behalf of the several defendants and appellees mentioned hereinabove.

John B. Lewis, Selden R. Glenn, and Henry M. Cline, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, Bailey P. Wootton, Atty. Gen.; by S. H. Brown, Asst. Atty. Gen.; H. W. Batson, J. W. Welch, Leslie W. Morris, Solicitors.

[fol. 673] [File endorsement omitted.]

Endorsed on cover: File No. 36,645. E. Kentucky, D. C. U. S. Term No. 30. Kroger Grocery & Baking Company, appellant, vs. John B. Lewis, Selden R. Glenn, and Henry M. Cline, etc., et al. Filed March 25, 1932. File No. 36,645.